Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

FLETCHER'S FINE FOODS, LTD.,

Petitioner,

vs.

JOHN GATES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD W. NICHOLS, Esq.
Bar No. 32604
Counsel of Record

McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Ninth Floor
Sacramento, California 95814
Telephone: (916) 444-3900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a corporation which is wholly owned by an agency or instrumentality of a political subdivision of a foreign state is precluded from "foreign state" status within the meaning of the Foreign Sovereign Immunities Act, and specifically 28 U.S.C. § 1603(a), solely because it is owned by an agency or instrumentality of the political subdivision rather than by the political subdivision itself, i.e., because it is a "lower-tier" entity.

2. Whether a corporation which is wholly owned by an agency or instrumentality of a political subdivision of a foreign state, and which performs functions that, in part, are for the benefit of that agency or instrumentality, is an "organ" of the political subdivision within the meaning of the Foreign Sovereign Immunities Act, and specifically 28 U.S.C. § 1603(b)(2).

LIST OF PARTIES

Plaintiffs and respondents John Gates, Robert Kinser, Clifford Travis, Dennis Conrad, Richard Doble, Edmund Vincelet, Richard Weyant and Jerome Binder (collectively "plaintiffs") are persons who were formerly employed at the meat packing plant of defendant Victor Fine Foods ("Victor") in Lodi, California. In connection with their employment, plaintiffs were participants and beneficiaries with regard to defendant Victor Fine Foods Group Benefits Plan ("Plan"), an employee welfare benefits plan for the Victor employees.

Victor was a trade name of defendant Golden Gate Fresh Foods, Inc., a California corporation ("Golden Gate"), which was the owner of the plant and was plaintiffs' employer. Victor itself (but not Golden Gate) has been dismissed out of this case as a party defendant. Defendant Fletcher's Fine Foods, Ltd., a Canadian federal corporation ("Fletcher's"), the petitioner herein, was the corporate grandparent (now great-grandparent) holder of a majority interest in Golden Gate. In turn, Fletcher's was wholly owned by defendant Alberta Pork Producers Development Corporation ("Alberta Pork"), a marketing board established as a body corporate pursuant to the Alberta Marketing of Agricultural Products Act.

Defendant Fred Knoedler was the president and chief executive officer of Golden Gate, and at different times was and now is president and chief executive officer of Fletcher's. He was also a director of both entities, during times which overlapped. Defendant Bill Duckenfield was the executive vice president, chief operating officer and a

LIST OF PARTIES – Continued

director of Golden Gate. He has never been an officer or director of Fletcher's. Defendant George Paleologou was the chief financial officer and a director of Golden Gate, and at different times was chief financial officer and a director of Fletcher's. He has been dismissed out of this case as a party defendant.

Defendants Assured Investors Life Company and Anthem Life Insurance Company are insurance companies which issued various insurance policies to Golden Gate. Anthem Life Insurance Company has been dismissed out of this case as a party defendant.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

This certiorari petition is filed by defendant-petitioner Fletcher's Fine Foods, Ltd., a Canadian federal corporation ("Fletcher's"). Fletcher's is a wholly owned subsidiary of the Alberta Pork Producers Development Corporation, a marketing board established as a body corporate pursuant to the Alberta Marketing of Agricultural Products Act.

Fletcher's, in turn, is the sole owner and corporate parent of Fletcher's, Inc., an Alberta corporation, and in a separate ownership chain, of Fletcher's Fine Foods, Inc., a Washington corporation. Fletcher's, Inc., in turn, owns all of the voting shares of Fletcher's Lodi Management Corporation, a British Columbia corporation ("FLM").[1] Fletcher's, Inc., also owns 73.5% of the voting shares of Golden Gate Financial Services, Inc., a Washington corporation ("Financial Services"), with FLM owning the remaining 23.5% of Financial Services' voting shares.[2] Financial Services, in turn, is the sole owner and corporate parent of Golden Gate Fresh Foods, Inc., a California corporation, which was the direct employer of the plaintiffs-respondents.

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[1] Non-voting shares of FLM are owned by Fletcher's, Inc., and by Frederick W. Knoedler, William B. Duckenfield and Goehring Meat, Inc.

[2] Non-voting shares of Financial Services are owned by Fletcher's and by Goehring Meat, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fletcher's Fine Foods, Ltd., defendant and appellant below, does hereby petition this Honorable Court for the issuance of a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on May 16, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 54 F. 3d 1457; a copy thereof is set forth in Appendix A submitted with this Petition. Also set forth, as Appendix B,

is a copy of the order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing *en banc*. The opinion and order of the District Court are unreported and a copy thereof is set forth as Appendix C.

JURISDICTION

The opinion of the Court of Appeals issued, and judgment was entered thereon, on May 16, 1995. Petitioner's petition for rehearing was denied, and its suggestion for rehearing *en banc* was rejected, on June 22, 1995. Petitioner moved for a stay of the Court of Appeals' mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure. On July 10, 1995, the Court of Appeals issued an order staying its mandate for a period of 30 days, pending the filing of this petition; a copy of that order is attached hereto as Appendix D. This petition is filed within that 30-day period.

Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition presents questions pertaining to the construction of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 et seq. Specifically at issue are subdivisions (a) and (b)(2) of 28 U.S.C. § 1603, which read as follows:

"For purposes of this chapter –

"(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

"(b) An 'agency or instrumentality of a foreign state' means any entity –

* * *

"(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . . "

STATEMENT OF THE CASE

Plaintiffs filed a class action complaint arising out of (a) the termination of health care coverage under the Plan, (b) the termination of plaintiffs' employment at the Victor plant, and (c) the closure of the plant. See Appendix E. Plaintiffs asserted five claims for relief: (i) violation of the WARN Act, 29 U.S.C. §§ 2101 et seq., for failure to give 60 days' notice of intent to close the plant; (ii) violation of COBRA, 29 U.S.C. §§ 1161 et seq., for failure to give plaintiffs notice of entitlement to, and actual opportunity to convert to, continuation health care coverage; (iii) breach of obligations under the Plan, 29 U.S.C. § 1132(a)(1)(B), for failure to pay benefits for covered health care services obtained prior to termination of Plan coverage; (iv) breach of fiduciary duty, 29 U.S.C. §§ 1109

and 1132(a)(2), for failure to cause the Plan to pay covered pre-Plan-termination benefits and to give notice of, and make available, continuation health care coverage; and (v) violation of 29 U.S.C. § 1140, for interfering with plaintiffs' opportunities to obtain both pre-Plan-termination and continuation health care coverage benefits by terminating the Plan.

Petitioner and Alberta Pork, in their answers, denied subject-matter jurisdiction. The District Court directed that the "foreign nationals" file dismissal motions addressing the subject-matter jurisdiction issue. After limited interrogatory and document production discovery had occurred, petitioner and Alberta Pork did so, asserting immunity under the FSIA.

The District Court entered an Order denying those dismissal motions and ruling on certain other motions which are not the subject of this petition. See Appendix C. The Court found that it had subject matter jurisdiction over petitioner and Alberta Pork because they "are employers for the purposes of COBRA, and perhaps ERISA and WARN." It made no finding as to the "foreign state" status of petitioner and Alberta Pork for purposes of the FSIA. Instead, it found that, even if they were foreign states, the allegations against them fell within the "commercial activities" exception to immunity under the FSIA. See 28 U.S.C. § 1605(a)(2).[3]

Petitioner and Alberta Pork filed an interlocutory appeal to the United States Court of Appeals for the

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[3] All subsequent statutory references herein are to sections within Title 28 U.S.C., unless otherwise expressly indicated.

Ninth Circuit. That Court reversed the District Court's decision as to Alberta Pork, but affirmed as to petitioner. See Appendix A. The Court of Appeals held that the District Court had erred in considering the substantive law of COBRA as a basis for its jurisdictional determination, and that it should have determined whether it had jurisdiction over petitioner and Alberta Pork prior to, and without regard to, its consideration of any otherwise applicable substantive law. The Court of Appeals also held that Alberta Pork was an "agency or instrumentality of a foreign state or political subdivision thereof" within the meaning of Section 1603, that the plaintiffs' allegations against Alberta Pork were not "based upon" its commercial activities, and that Alberta Pork had not waived its right to claim immunity. Accordingly, the Court of Appeals held that, under the FSIA, Alberta Pork was entitled to immunity with regard to plaintiffs' allegations.

As to petitioner, however, the Court of Appeals held (in Section III-B and the last paragraph of Section VI of its opinion) that, because petitioner was wholly owned by Alberta Pork, an agency or instrumentality of the Province of Alberta, rather than by the Province itself, petitioner was not entitled to "agency or instrumentality" status within the meaning of Section 1603 and that therefore petitioner was not entitled to "foreign state" status or to FSIA immunity. The Court reasoned that, because Alberta Pork itself was not a "foreign state or political subdivision thereof," petitioner could not be an "agency or instrumentality of a foreign state." The Court rejected the concept that, because it had found Alberta Pork to be an "agency or instrumentality of a foreign state," Alberta

Pork itself was therefore a "foreign state or political subdivision thereof" within the meaning of Section 1603(a) and that its 100% ownership of petitioner thus established "agency or instrumentality" status on the part of petitioner as well. Accordingly, the Court of Appeals affirmed the District Court's Order as to petitioner, and did not reach the question of whether plaintiffs' employment-based allegations against petitioner were "based upon" petitioner's commercial activities, i.e., its pork marketing activities or its derivative ownership of plaintiffs' direct employer, Golden Gate.

The District Court had not raised the distinction drawn by the Court of Appeals between petitioner and Alberta Pork, involving the status of petitioner as a "lower-tier" owned entity, and neither counsel for petitioner and Alberta Pork nor plaintiffs' counsel had briefed or argued the distinction during the course of the initial appeal. Accordingly, petitioner filed a petition for rehearing and suggestion for rehearing *en banc*, addressing the distinction. That rehearing petition was denied, however, and the suggestion for rehearing *en banc* was rejected. See Appendix B. This certiorari petition follows.

REASONS FOR GRANTING THE PETITION

This case presents important questions of statutory construction with regard to the FSIA. At issue are provisions within Section 1603, specifically the terms "foreign state," "agency or instrumentality of a foreign state or political subdivision thereof," and "organ."

The decision of the Court of Appeals constitutes a holding that only entities which are directly owned by a foreign state or political subdivision can qualify for "agency or instrumentality" status within the meaning of Section 1603. It constitutes a holding that "lower-tier" entities, i.e., entities which are owned by an agency or instrumentality rather than by the foreign state or political subdivision itself, do not themselves qualify for agency or instrumentality status.

On this ownership "tiering" issue, the opinion of the Ninth Circuit stands alone among the Circuits, and conflicts with decisions of the Courts of Appeals for the Second, Third, Fifth, Sixth, Seventh and District of Columbia Circuits. It also conflicts with decisions of District Courts both from within those Circuits and from within the First and Fourth Circuits as well. It even conflicts with some of the Ninth Circuit's own prior holdings.[4]

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[4] Further, although this Court expressly did not rule on the issue, this Court's decision in *Saudi Arabia* v. *Nelson*, 507 U.S. ___, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993), may impliedly conflict with the Court of Appeals' decision herein. In *Saudi Arabia* v. *Nelson*, this Court noted that "[t]here is no dispute here that Saudia Arabia, the Hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." *Id.*, 123 L. Ed. 2d at 58. Structurally, however, although Nelson had alleged that Royspec was "a corporation owned and controlled by the government of Saudi Arabia," *Nelson* v. *Saudi Arabia*, 923 F. 2d 1528, 1529 (5th Cir. 1991), reversed sub nom. *Saudia Arabia* v. *Nelson*, *supra*, the District Court had found as an undisputed fact that Royspec was *founded by the Hospital* and acted as *the Hospital's* purchasing agent in the United States. *Nelson* v. *Saudi Arabia*, *supra* at 1536. If Royspec was an entity of the Hospital rather than of Saudi Arabia itself, then Royspec would have

Moreover, aside from case precedent, the decision in the instant case runs counter to congressional policy of non-intervention in the internal entity operational (organ) and ownership structuring decisions of foreign governments. The FSIA is a statute impacting the international community, and thus requires both national uniformity and consideration of comity in its interpretation. By resting its holding upon the decision of the Province of Alberta to allow petitioner to be acquired indirectly through the Province's instrumentality Alberta Pork rather than directly, however, the decision of the Court of Appeals detracts from those congressional aims.

Moreover, the "lower-tier" issue pertains not only to questions of ownership structure, but also to the proper construction of the term "organ." That term is not defined in the FSIA. The Court of Appeals stated in a conclusory manner, however, and without either case citation or discussion as to what *does* constitute an "organ," that petitioner, "an ordinary pork processing plant, cannot be considered an 'organ' of the Province of Alberta." An "organ" of an entity, however, is a subordinate entity that either is controlled by that other entity or that acts for the benefit of that other entity. This Court should fill the gap which both the Court of Appeals' decision and the FSIA itself has left open, by construing the term.

Much mischief on a national basis will result if the instant decision is allowed to stand. The immunity rights

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been a "lower-tier" entity and its status would be quite similar to that of petitioner. In this context, the "tiering" issue is common both to the question of ownership status and to the question of "organ" status.

of lower-tier foreign sovereign owned entities will henceforth depend both (i) upon the jurisdiction in which they are sued, and (ii) upon the particular manner in which the sovereign has elected to structure its ownership and its operations methods. Moreover, in addition to the subject of immunity, the decision of the Court of Appeals could potentially affect the ability of such lower-tier entities to remove actions against them from state court to federal court (Section 1441(d)), and could potentially impose jury trials upon them (Section 1330), because such entities would not be treated as "foreign states." Even those portions of the FSIA placing limits upon the types of property seizable for enforcement of judgments (Section 1610) could be jeopardized.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, FIFTH, SIXTH, SEVENTH AND DISTRICT OF COLUMBIA CIRCUITS, AND EVEN WITH SOME OF ITS OWN DECISIONS.

On the "tiering" issue the Ninth Circuit stands alone among the Circuits. Its decision conflicts[5] with opinions (either holdings or dicta) of the Courts of Appeals for the

Second (*O'Connell Machinery Co.* v. *M. V. Americana*, 734 F. 2d 115 (2d Cir. 1984), cert. denied, 469 U.S. 1086 (1984) – [Italia Di Navigazione, S.p.A., doing business as the Italian Line]),

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[5] With its citations, petitioner also identifies in brackets the specific "lower-tier" entities afforded "foreign state" status in the conflicting cases.

Third (*Federal Insurance Co.* v. *Richard I. Rubin & Co., Inc.*, 12 F. 3d 1270 (3d Cir. 1993), cert. denied sub nom. *Ejay Travel, Inc.*, v. *Algemeen Burgerlijk Pensioenfonds*, ___ U.S. ___, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994) [USA Holding B.V.], and see *Trump Taj Mahal* v. *Costruzioni Aeronautiche Giovanni*, 761 F. Supp. 1143, 1149-1151 (D. N.J. 1991), aff'd mem. 958 F. 2d 365 (3d Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 84, 121 L. Ed. 2d 47 (1992) [Agusta S.p.A.]),

Fifth (*Linton* v. *Airbus Industrie*, 30 F. 3d 592, 598 n.29 (5th Cir. 1994) [Airbus and Aeroformation]),

Sixth (*Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F. 2d 445, 448-449 (6th Cir. 1988) [Trefimetaux]),

Seventh (*Allendale Mutual Insurance Co.* v. *Bull Data Systems, Inc.*, 10 F. 3d 425 (7th Cir. 1993) [Zenith Data Systems]), and

District of Columbia (*Gilson* v. *Republic of Ireland*, 682 F. 2d 1022 (D.C. Cir. 1982) [Leictron Teorantal]) Circuits.

The decision in the instant case also conflicts with decisions of District Courts both from within those Circuits[6] and from within the

First (*Lopez del Valle* v. *Gobierno de la Capital*, 855 F. Supp. 34, 35-36 (D. P.R. 1994) [Lagoven, S.A.]), and

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[6] See *Talbot* v. *Saipem A.G.*, 835 F. Supp. 352, 353 n.2 (S.D. Tex. 1993) [Saipem S.p.A.], *Ocasek* v. *Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992) [Asbestos Corporation, Ltd.], and *Balentine* v. *Union Mortgage Co.*, 795 F. Supp. 266 (N.D. Ill. 1992) [Skopbank], and *Keller* v. *Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787, 788 (D. D.C. 1985) [Transportes Aero Nacionales Ecuadorianos (TAME C.A.)].

Fourth (*Outbound Maritime Corp.* v. *P. T. Indonesian Consortium*, 582 F. Supp. 1136, 1143-44 (D. Md. 1984) [ICCI/AME Joint Venture]) Circuits as well.

The decision in the instant case even conflicts with some of the Ninth Circuit's own prior holdings. See *Straub* v. *A P Green, Inc.*, 38 F. 3d 448, 451 (9th Cir. 1994) [Atlas Turner], *Richmark Corp.* v. *Timber Falling Consultants, Inc.*, 937 F. 2d 1444, 1446 n.1 (9th Cir. 1991), cert. denied sub nom. *China Everbright Trading Co.* v. *Timber Falling Consultants, Inc.*, ___ U.S. ___, 113 S. Ct. 295, 121 L. Ed. 2d 219 (1992) [Beijing Ever Bright], and *America West Airlines, Inc.* v. *GPA Group, Ltd.*, 877 F. 2d 793, 795-96 n.2 (9th Cir. 1989) [Airmotive]. It also appears to conflict with a holding in a Ninth Circuit decision issued by another panel six days after the decision in the instant case (*The Export Group* v. *Reef Industries, Inc.*, 54 F. 3d 1466 (9th Cir. 1995) [Instituto Mexicano del Cafe, or INMECAFE], and with the reasoning of yet another Ninth Circuit decision (*Chuidian* v. *Philippine National Bank*, 912 F. 2d 1095, 1099-1103 (9th Cir. 1990) [employee of foreign state commission]).

II. THE NINTH CIRCUIT'S DECISION CONFLICTS BOTH WITH THE LANGUAGE OF THE FSIA AND WITH CONGRESSIONAL POLICIES OF NON-INTERVENTION IN INTERNAL ENTITY STRUCTURING DECISIONS BY FOREIGN GOVERNMENTS AND OF UNIFORMITY OF DECISION ON IMMUNITY ISSUES.

If the Court of Appeals had been writing on a clean slate, its decision might have constituted a tenable literal reading of the interrelationship between Sections 1603(a)

and 1603(b). As demonstrated by the cited conflicting opinions, however, the Court of Appeals' reading of those provisions is not the *only* tenable reading of them. Not only does Congress' desire for national uniformity in the area of international relations argue against the Ninth Circuit's decision, but both the language and the underlying policies of the FSIA point in a different direction.

The Court of Appeals found that Alberta Pork was an "agency or instrumentality" under the FSIA. The term "foreign state" is defined in Section 1603(a) to "*include[ ]* a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." (Emphasis supplied.) The term "includes" argues in favor of a non-restrictive construction of the term "foreign state," i.e., a construction of that term which is not limited to the "literal language" of subsection (b). The Court of Appeals recognized that the FSIA's "legislative history suggests that Congress intended the terms 'organ' and 'agency and instrumentality' to be read broadly." Notwithstanding that recognition, however, the Court of Appeals' purported reliance upon "the literal language of the statute" in fact constituted a "narrow" rather than a "broad" reading of its terms, and did not properly construe the effect of the word "includes."[7] See *Chuidian, supra* at 1101.

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[7] The Court of Appeals noted that "the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined as* an agency or instrumentality." In doing so, the Court reversed the appropriate syllogism. Section 1603(b) plainly states that the term "agency or instrumentality" is *includ[ed]* within the definition of "foreign state." It is, therefore, irrelevant that the term

Under a "broad" reading of the FSIA, petitioner qualifies as an agency or instrumentality of the Province of Alberta *both* on the basis of its lower-tier ownership status *and* as an "organ" of the Province; *either* status, of course, would qualify it for "foreign state" treatment under Section 1603. The Section 1603 definitions raise ambiguities which require courts to look to legislative history, as, in fact, the Court of Appeals did. In doing so, however, that Court paid insufficient attention to Congress' intent not to interfere with the internal workings and ownership structurings of foreign sovereigns.

Although the Court of Appeals acknowledged that the term "agency or instrumentality" is to be read "broadly," its holding would effectively preclude *any* lower-tier entity from immunity, on the theory that Congress did not so intend. The Court referred to *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 626-627 (1983), and to this

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"foreign state" is not *limited to*, or "defined as," the term "agency or instrumentality."

Moreover, the legislative history of the FSIA, in discussing the type of entity which it covers, uses language of inclusiveness rather than of exclusivity. "As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could *assume a variety of forms, including* a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 15, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6614. (Emphasis supplied.) As noted in *Trump Taj Mahal*, *supra* at 1151, that list is illustrative rather than exclusive.

Court's counsel of "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations." In its decision, however, the Court of Appeals ignored this Court's concern that "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration" not be frustrated. *Id.* at 626.

Here, the Province of Alberta made a decision to "structure [its] governmental activit[y]" in a manner authorizing the acquisition of petitioner by its agency and instrumentality, Alberta Pork, rather than by the Province itself.[8]

The Court of Appeals' decision caused the question of petitioner's "foreign state" status to turn on that single structural decision; if petitioner had been acquired directly by the Province itself, presumably the Court of

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[8] As noted by the Court of Appeals, this decision required the issuance by the Alberta Agricultural Products Marketing Council, a governmental body, of a regulation authorizing the acquisition. Moreover, as a general proposition Alberta Pork's own plans (including its proposal to acquire petitioner) have no status until they are approved by the Lieutenant Governor in Council, Alberta's equivalent of the President's Cabinet in the American system of government, on recommendation of the Marketing Council.

Indeed, long after Alberta Pork's acquisition of petitioner, the Province made a grant to Alberta Pork to assist it in liquidating the loan by which Alberta Pork had acquired petitioner in the first place. Moreover, when petitioner restructured its derivative ownership of Golden Gate in November 1990, the Alberta Provincial Treasury guaranteed a $12 million loan made to petitioner in connection therewith.

Appeals would have treated petitioner in the same way it treated Alberta Pork, i.e., as a "foreign state." The Province's decision as to how the ownership of petitioner should be taken, however, was one for Albertans to make, and the Court of Appeals' rejection of the derivative ownership structure selected by the Province constituted an improper judicial intrusion into Alberta's internal affairs, of a type which Congress did not intend.

The legislative history of the FSIA supports this analysis. One aim of the FSIA is "uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."[9] H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 13 (1976), reprinted at 1976 U.S. Code Cong. & Admin. News 6604, 6611. The FSIA was not "intended to affect . . . the attribution of responsibility between or among entities of a foreign state." *Id.* at 12, reprinted at 6610. Congress, in enacting the FSIA, adopted a "restrictive theory of sovereign immunity." That theory, however, merely restricts immunity to "cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." *Id.* at 6613. It does not impact the "broad" reading to be given to the "foreign state," "organ" and "agency or instrumentality" terms of Section 1603.

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[9] A Ninth Circuit rule which conflicts with holdings of six other circuits does not promote "uniformity of decision." See *Bancec, supra*, 462 U.S. at 622 n. 11.

The Court of Appeals' concern about "provid[ing] potential immunity for every subsidiary in a corporate chain, no matter how far down the line," was misplaced. Congress itself articulated the limits of derivative immunity entitlement, by excluding therefrom both American subsidiaries and subsidiaries created under the laws of third countries. Section 1603(b)(3). Particularly in the face of the very considerable case authority to the contrary, the Court of Appeals should not have added to this congressional articulation of limits.

III. THIS COURT SHOULD INTERPRET THE FSIA BY CONSTRUING THE TERM "ORGAN," WHICH THE FSIA DOES NOT DEFINE.

Even aside from the "lower-tier" issue as it pertains to ownership, petitioner is also an "organ" of the Province of Alberta. The term "organ" is not defined in the FSIA. The Court of Appeals stated in a conclusory manner, and without either case citation or discussion as to what *does* constitute an "organ," that petitioner, "an ordinary pork processing plant, cannot be considered an 'organ' of the Province of Alberta." In petitioner's view, however, an "organ" is a subordinate entity that either is controlled by another entity or that acts for the benefit of that other entity. This Court should fill the gap which both the Court of Appeals' decision and the FSIA itself have left open, by articulating a definition of the term "organ."

The performance by an entity of functions for the benefit of an admitted "agency or instrumentality" of a political subdivision should suffice to make that entity an

"organ" of the political subdivision for purposes of Section 1603(b).[10]

The Court of Appeals expressly found that Alberta Pork was an agency or instrumentality of a foreign state political subdivision within the meaning of Section 1603(b), and it was undisputed that the Province's consent was required before Alberta Pork could acquire petitioner. By referring to the nature of petitioner's business as that of "an ordinary pork processing plant," the Court of Appeals appears to have confused the "commercial activities exception" of Section 1605(a)(2) with the definitional provisions of Section 1603.[11] An entity may be

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[10] The regulation issued by the Alberta Agricultural Products Marketing Council to enable Alberta Pork to acquire petitioner, Alberta Regulation 99/81, expressly recited that the purchase authorization was being made "[i]n order to enable the Board to effectively promote and sell hogs and processed pork." The Board's name was subsequently changed to Alberta Pork, see Alberta Regulations 379/88 and 436/91. Thus, petitioner's activities are, at least in part, for *Alberta Pork*'s benefit.

[11] To the extent that the Court of Appeals' discussion of the nature of petitioner's activities might have been relevant, that relevance would have gone only to the question of "control," i.e., does a foreign state "control" the activities of the immunity claimant. See *Richmark, supra*. The issue of control, however, should not be relevant where there is an admitted 100% ownership of the immunity claimant by a "foreign state." Indeed, because *Richmark* applied the concept of "control" to the immunity issue, it also necessarily held that the language of Section 1603(b), in defining the terms "organ" and "agency or instrumentality," is not exclusive. The term "control" appears nowhere in Section 1603; to the extent that it is relevant at all, it would appear to apply only to the definition of the term "organ." In this regard, petitioner submits that an "organ" is an

covered under the FSIA under the broad Section 1603(a) definition of "foreign state," however, while at the same time being excluded under Section 1605 from the immunity provisions of the statute. The fact that petitioner might, or might not, be excluded from immunity under Section 1605(a)(2), however, is a separate question, which the Court of Appeals did not address.[12]

IV. THE NINTH CIRCUIT'S DECISION WILL HAVE CONSEQUENCES WITH REGARD TO SUBJECTS BESIDES IMMUNITY.

Two clear, albeit perhaps unintended, effects of the Ninth Circuit's decision will be (i) to preclude the right of lower-tier foreign sovereign-owned entities to remove state court actions to federal court pursuant to Section 1441(d), and (ii) to require such entities potentially to face jury trial demands notwithstanding Section 1330,[13] in each instance because lower-tier entities would not qualify as "foreign states." It is even conceivable that the decision might have the additional, presumably unintended, consequence of allowing derivatively-owned assets of foreign sovereigns to be subjected to attachment and

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entity that either is "controlled" by another entity or that acts for the benefit of that other entity.

[12] In petitioner's view, however, the same "nexus" considerations discussed by the Court of Appeals with regard to Alberta Pork apply with equal force to petitioner.

[13] Indeed, the District Court in the instant case has ruled that the WARN Act claim is to be tried to a jury as to all defendants, including petitioner.

execution when, under Sections 1609-1611, they could not otherwise be subjected thereto. All of these potential effects are inconsistent with congressional intent that a "broad" reading to be given to the term "agency or instrumentality."

A statute is to be interpreted in its entirety, not merely on a section-by-section basis. The language of the FSIA demonstrates that, when Congress intended to make distinctions of the type drawn by the Court of Appeals, it knew how to do so. Congress enacted specific substantive distinctions between "foreign states" and "agencies or instrumentalities" on the subjects of service of process, venue, punitive damages, and, as indicated, attachment and execution. Compare Section 1608(a) with 1608(b), and Section 1610(a) with 1610(b), and see Sections 1606 and 1391(f). No similar intent to provide for differential treatment exists in Section 1603 itself, between subdivisions (a) and (b) thereof. The Court of Appeals should not have added to the distinctions in Sections 1606, 1608, 1610 and 1391(f).

CONCLUSION

The decision of the Ninth Circuit Court of Appeals precluding "tiering" of foreign sovereign ownership and operational interests will be productive of substantial confusion and differential treatment among lower-tier entities. It runs contrary to the case law prevailing in all other Circuits which have afforded "foreign state" status to lower-tier entities, and it both misinterprets the language of the FSIA and is contrary to congressional policy

underlying the statute. Moreover, the decision is likely to have similar undesirable impacts on issues besides immunity, in which foreign sovereigns will also have interest. Accordingly this Court should, and petitioner respectfully requests this Court to, grant petitioner's petition for writ of certiorari, for the purpose of reviewing that portion of judgment of the Court of Appeals dealing with the "tiering" and "organ" issues, specifically Section III-B and the last paragraph of Section VI of its judgment.

DATED: July 28, 1995

Respectfully submitted,

RICHARD W. NICHOLS, Esq.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Ninth Floor
Sacramento, California 95814
Telephone: (916) 444-3900

Attorneys for Petitioner
Fletcher's Fine Foods, Ltd.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GATES; ROBERT KINSER; CLIFFORD TRAVIS; DENNIS CONRAD; RICHARD DOBLE; EDMUND VINCELET; RICHARD WEYANT and JEROME BINDER; JEROME BINDER [sic], individually and on behalf of all others similarly situated, *Plaintiffs-Appellees,* v. VICTOR FINE FOODS; GOLDEN GATE FRESH FOODS, INC., *Defendant,* and FLETCHER'S FINE FOODS; ALBERTA PORK PRODUCERS DEVELOPMENT CORPORATION, *Defendants-Appellants.*	No. 93-16141 D.C. No. CV-92-00095-LKK OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Chief Judge, Presiding

Argued and Submitted
February 15, 1995 – San Francisco, California

Filed May 16, 1995

Before: Thomas Tang and Diarmuid F. O'Scannlain, Circuit Judges; Robert R. Merhige, Jr.,* District Judge.

Opinion by Judge O'Scannlain

SUMMARY

Civil Litigation and Procedure/Immunity/ International Law

The court of appeals affirmed in part a district court judgment, reversed in part and remanded. The court held that a Canadian entity that markets and promotes hogs was immune from jurisdiction under the Foreign Sovereign Immunities Act (FSIA), where the plaintiffs' employment-based claims were not related to the entity's commercial activities.

Appellant Alberta Pork Producers Development Corp. is a Canadian entity established pursuant to the Alberta Marketing of Agricultural Products Act (AMAPA), to provide for the effective marketing and promotion of hogs produced in the Province of Alberta. Under Alberta law, the AMAPA provides that producers of a particular agricultural product may apply to a governmental body called the Alberta Agricultural Products Marketing Council for approval to establish a marketing board. The Council plays an active supervisory role.

Alberta Pork sells hogs to pork processors both within and outside of Canada. Alberta Pork is authorized

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*The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

to acquire businesses that process and sell pork. Pursuant to this authority, Alberta Pork purchased appellant Fletcher's Fine Foods (FFF), a pork processing plant headquartered in British Columbia. FFF is parent to a number of subsidiaries, and through these subsidiaries owned Golden Gate Fresh Foods, Inc. (GGFF), a California pork processing plant.

GGFF maintained a welfare benefit plan known as the Victor Fine Foods Group Benefits Plan. FFF discontinued its financial support of GGFF. GGFF terminated the Plan. The GGFF plant closed, and all the employees were terminated.

The former employees of GGFF brought a class action against GGFF, Alberta Pork, FFF and other defendants, asserting claims for violation of the Worker Adjustment and Retraining Notification Act (WARN), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and the Employee Retirement Income Security Act. The claims arose out of GGFF's termination of the GGFF employees' health care coverage and termination of the GGFF employees' employment.

Alberta Pork and FFF moved to dismiss for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act (FSIA). The district court concluded that the defendants were not immune from the court's jurisdiction because their actions fell into the "commercial activities" exception to the FSIA's grant of immunity. Alberta Pork and FFF appealed.

[1] The FSIA provides immunity only for "foreign states." The FSIA defines a foreign state to include any "agency or instrumentality of a foreign state." In order

for an entity to be considered an "agency or instrumentality," the entity must be either "an organ" of the foreign state or political subdivision thereof, or a majority of its shares must be owned by the foreign state or political subdivision thereof. [2] Congress' statement in relevant legislative history that a "state trading company" and "an export association" can be "organs" of a foreign state indicated Congress' belief that an entity's involvement in commercial affairs does not automatically render the entity non-governmental. Alberta Pork was an agency or instrumentality of the Province of Alberta.

[3] However, FFF, an ordinary pork processing plant, could not be considered an "organ" of the Province of Alberta. [4] Although FFF was wholly owned by Alberta Pork, an agency or instrumentality of a foreign state, FFF was not owned by "a foreign state or political subdivision thereof," as required by the FSIA. [5] Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions and agencies or instrumentalities of foreign states and political subdivisions. [6] FFF could not be considered an agency or instrumentality and, thus, was entitled to no protection from the FSIA.

[7] As an agency or instrumentality of a foreign state, Alberta Pork was entitled to immunity unless it fell into one of the FSIA's exceptions to immunity. [8] The FSIA provides that foreign states which are engaging in commercial activity are not immune from the jurisdiction of the United States courts. [9] Statutory language required that the plaintiff's cause of action be "based upon" the commercial activity in question. [10] The district court erred in referring to COBRA's definition of employer to determine whether the court had jurisdiction under the

FSIA. It was improper to rely on substantive law as a basis for a finding of jurisdiction under the FSIA. [11] Moreover, the Supreme Court has held that the FSIA presumes that separate juridical entities are normally to be treated as independent from one another. [12] In this case, it could not be said that Alberta Pork engaged in a commercial activity that formed the basis for the GGFF employees' employment-based claims. [13] Mere stock ownership, without more, did not create any relationship to the GGFF employees' claims. [14] The record contained no evidence to suggest that Alberta Pork was involved in GGFF's decision to cancel its Plan and to close its plant. Because Alberta Pork's commercial activities were unrelated to the GGFF employees' claims, Alberta Pork did not fall into the FSIA's commercial activities exception.

[15] Even if Alberta Pork had agreed to submit to the jurisdiction of United States courts in connection with a loan collection action by a bank in Washington state, such an action would not have meant that it also agreed to submit to the jurisdiction of the United States courts in connection with a dispute involving GGFF employees in California. Thus, Alberta Pork did not waive its immunity under the FSIA.

COUNSEL

Richard W. Nichols, McDonough, Holland & Allen, Sacramento, California, for the defendants-appellants.

James E. Eggleston, Eggleston, Siegel & LeWitter, Oakland, California, for the plaintiffs-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

This case requires us to explore the statutory maze of the Foreign Sovereign Immunities Act as it applies to Canadian entities that market and promote hogs raised in the Province of Alberta and operate a pork processing plant in British Columbia, either one of which might affect employees in a plant in California.

I

Alberta Pork Producers Development Corporation ("Alberta Pork") is a Canadian entity established pursuant to the Alberta Marketing of Agricultural Products Act, R.S.A. 1980, c. M-5, to provide for the effective marketing and promotion of hogs produced in the Province of Alberta. Alberta Pork is the sole marketing agent through which hogs raised in Alberta for slaughter must be sold. Hog producers must sell their hogs to Alberta Pork, which receives a service charge for each hog. Alberta Pork, in turn, sells the hogs to pork processors both within and outside of Canada and remits the proceeds to the producers.

In order to promote and to sell hogs effectively, Alberta Pork is authorized to acquire businesses that process and sell pork. Pursuant to this authority, Alberta Pork purchased Fletcher's Fine Foods ("FFF"), a pork processing plant headquartered in British Columbia, and it currently owns 100% of the shares of FFF. FFF, in turn, is parent to a number of subsidiaries, and through these

subsidiaries owned Golden Gate Fresh Foods ("GGFF"), a California pork processing plant.

GGFF was located in Lodi, California and operated under the trade name of Victor Fine Foods. GGFF maintained a welfare benefit plan known as the Victor Fine Foods Group Benefits Plan ("the Plan"). Throughout the time that FFF owned GGFF, GGFF experienced great financial difficulties. Finally, on November 19, 1991, FFF discontinued its financial support of GGFF. The next day, GGFF terminated the Plan. On December 13, the GGFF plant closed, and all the employees were terminated.

The former employees of GGFF ("GGFF employees") brought a class action against GGFF, Alberta Pork, FFF and other defendants, asserting five claims: (1) violation of the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 *et seq.*, for failure to provide 60-days notice of intent to close the plant; (2) violation of the continuation rules of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-68, for failure to give the Plan participants notice of entitlement to, and actual opportunity to convert to, continuation health care coverage upon their terminations from employment; (3) breach of Plan obligations for failure to pay benefits for covered health care services rendered before the Plan was terminated; (4) breach of fiduciary duty for failure to cause the Plan to pay covered pre-Plan-termination benefits and to give notice of, and make available, continuation health care coverage; and (5) violation of section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.

§ 1140, for interfering with the GGFF employees' opportunities to obtain pre-Plan-termination and continuation health care coverage benefits by terminating the Plan.

Alberta Pork and FFF moved to dismiss for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act ("the Act"), 28 U.S.C. §§ 1602-11. The district court declined to decide whether Alberta Pork and FFF were entities protected by the Act; instead, the court assumed that they were but concluded that the defendants were not immune from the court's jurisdiction in any event because the defendants' actions fell into the commercial activities exception to the Act's grant of immunity. Alberta Pork and FFF appeal.

II

The Foreign Sovereign Immunities Act provides the exclusive source of subject matter jurisdiction over suits involving foreign states and their instrumentalities. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). Under the Act, foreign states are presumed to be immune from the jurisdiction of United States courts unless one of the Act's exceptions to immunity applies. 28 U.S.C. § 1604. For instance, a foreign state is not immune if the plaintiff's cause of action is based upon a commercial activity carried on by the foreign state. 28 U.S.C. § 1605(a).

The parties first dispute whether the Act is even implicated. The GGFF employees contend that Alberta Pork and FFF are not "foreign states" within the meaning of the Act, and thus can gain no protection from it.

Assuming that the defendants are foreign states, the parties next dispute whether the defendants are nonetheless subject to jurisdiction because they fall into the Act's commercial activities exception. We examine these contentions in turn.

III

[1] The Foreign Sovereign Immunities Act provides immunity only for "foreign states." 28 U.S.C. § 1604. The Act defines a foreign state to include any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603. In order for an entity to be considered an "agency or instrumentality," three requirements must be met. First, the entity must be a separate legal person. Second, the entity must not be a citizen of the United States nor be created under the laws of any third country. Finally, the entity must be either "an organ" of the foreign state or political subdivision thereof, or a majority of its shares must be owned by the foreign state or political subdivision thereof. 28 U.S.C. § 1603(b). The parties agree that the defendants satisfy the first and second requirements. Therefore, the issue before us is whether or not they are "organs" of a foreign state or political subdivision thereof, or majority-owned by a foreign state or political subdivision.

The Act's legislative history suggests that Congress intended the terms "organ" and "agency or instrumentality" to be read broadly. The House Report states that:

> entities which meet the definition of an "agency or instrumentality of a foreign state" could

> assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, 94th Cong. 2nd Sess. (1976), *reprinted at* 1976 U.S.C.C.A.N. 6604, 6614.

The case law provides us with little guidance because most of the cases discussing this issue involve entities owned by socialist governments.[1] *See, e.g., Yessenin-Volpin*

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[1] The cases that the GGFF employees cite are not relevant. The GGFF employees maintain that the defendants are not organs of a foreign state because "instrumentalities and agencies are accorded a presumption of independence from foreign states." However, there is no presumption of independence when considering the threshold question of whether an entity is a foreign state for purposes of the Act; rather, such a presumption comes into play only when courts must determine whether to impute the misdeeds of a government agency to the government itself. As the Fifth Circuit explained:

> The use of the single term "agency" for two purposes in the context of this case may cause some confusion. The [Act] uses it to determine whether an "agency" of the state may potentially qualify for foreign sovereign immunity itself under the [Act]. This is a completely different question from that which we must address here: whether or not the [National Grains Production Co.] enjoyed an alter ego relationship with the Federal Republic of Nigeria so that it could bind Nigeria to a contract. . . . [T]he level of state control required to establish an "alter ego" relationship is more extensive than that required to establish [Act] agency.

Hester Int'l Corp. v. Federal Republic of Nigeria, 879 F.2d 170, 177 n.5 (5th Cir. 1989).

v. Novosti Press Agency, 443 F. Supp. 849, 852 (S.D.N.Y. 1978). Thus in determining whether Alberta Pork and FFF are "foreign states" for purposes of the Act, we focus on the statutory text and legislative history. We examine each defendant in turn.

A

Under Alberta law, the Marketing of Agricultural Products Act, R.S.A. 1980, c. M-5, provides that producers of a particular agricultural product can apply to a governmental body called the Alberta Agricultural Products Marketing Council ("Council") for approval to establish a marketing board. *Id.* § 15. Pursuant to this procedure, hog producers submitted a plan which the Council approved, and Alberta Pork was formed as the marketing board for hog producers in 1968. Alberta Hog Producers' Marketing Plan, 1968, Alta. Reg. 195/68.

Although the Council does not appear to exercise day-to-day control over marketing boards, it does play an active supervisory role. For example, a board cannot be created until a group of producers submits to the Council a proposed plan to be administered by a board. c. M-5, § 15. Once the plan is approved and the board is established, the Council may authorize the board to issue regulations requiring producers, among other things, to produce according to quotas, *id.* § 27(1)(a), to furnish information relating to the production and marketing of specified products, *id.* § 26(b), and to pay service charges, *id.* § 26(f). These provisions suggest that a board can act only in a manner and on the subjects that the Council has previously authorized. Indeed, when Alberta Pork

wanted to buy FFF, the Council had to issue a regulation authorizing the acquisition. *See* Alberta Pork Producers' Marketing Plan, 1968 Amendment Regulation, Alta. Reg. 99/81.

The Council also has the authority to require a board to furnish it with any information and records that the Council desires. c. M-5, § 11. A board cannot issue any regulations without the approval of the Council, *id.* § 29(1), and if there is a conflict between regulations issued by the Council and regulations issued by a board, the Council's regulations prevail, *id.* § 28. Further, the Council may ask a board to amend or to repeal its regulations, and if the board does not do so within 45 days, the Council may do so itself. *Id.* § 30.

The Marketing of Agricultural Products Act also establishes a mechanism whereby a producer who is dissatisfied with a board decision can appeal to an appellate body appointed by the Minister, *Id.* §§ 36-43. In this way the board resembles an administrative agency. Finally, members of a board are immune from liability for acts performed in good faith in carrying out their duties, *id.* § 47 – a protection normally afforded to governmental actors.

These provisions notwithstanding, the GGFF employees argue that the government is not significantly involved in the activities of Alberta Pork. The GGFF employees maintain that Alberta Pork is essentially a commercial operation – Alberta Pork buys live hogs from producers and sells them to packers. Further, Alberta Pork is supported by hog producers, not by the government. Alberta Pork is supported by a $1.25 per hog

service charge that it receives from hog producers. Finally, the GGFF employees note that hog producers are the only persons eligible to become directors of Alberta Pork. Alta. Reg. 195/68, § 10. Consequently, the GGFF employees conclude that Alberta Pork is an agent of hog producers, not of the Province.

[2] We reject the GGFF employees' arguments. Congress' statement in the legislative history that a "state trading company" and "an export association" can be "organs" of a foreign state indicates Congress' belief that an entity's involvement in commercial affairs does not automatically render the entity non-governmental. This conclusion is especially sound here given that the purpose of the entity in question is to advance the Province of Alberta's interest in marketing Alberta hogs. *Id.* § 3(1).[2] Finally, that the Province is not directly involved in the day-to-day activities of Alberta Pork does not mean that it is not exercising control over the entity, especially, as here, where the Province's laws and regulations narrowly circumscribe the entity's ability to act independently. Consequently, we conclude that Alberta Pork is an agency or instrumentality of the Province of Alberta.

B

[3] The clear language of the Act does not allow us to reach the same conclusion with respect to FFF, however. To recap, the Act provides that a "foreign state" includes

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[2] In addition, Alberta Pork does more than just buy and sell hogs; it also carries on educational activities and supports research in the swine industry. Alta. Reg. 195/68, § 3(3)(c).

an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). To be an "agency or instrumentality," the entity must *either* be an "organ of a foreign state" or have a majority of its shares owned by "a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b). FFF, an ordinary pork processing plant, cannot be considered an "organ" of the Province of Alberta. Thus, FFF can be an agency or instrumentality only if a majority of its shares is owned by "a foreign state or political subdivision thereof."

[4] FFF is wholly owned by Alberta Pork. Alberta Pork, we have just concluded, is an agency or instrumentality of a foreign state. Thus, FFF is wholly owned by an agency or instrumentality of a foreign state; however, FFF is not owned by "a foreign state or political subdivision thereof," as required by the statute.

One might argue that once we determine that Alberta Pork is an agency or instrumentality, then it ipso facto becomes a foreign state or political subdivision thereof. However, the literal language of the statute requires us to reject that argument. First, the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined as* an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of section 1603, then it also would have intended a "political subdivision" to mean "a foreign state" because section 1603(a) defines a foreign state as including both "a political subdivision of a foreign state

or an agency or instrumentality of a foreign state." The statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof."

For example, section 1603(b)(2) provides that the entity must be "an organ of a foreign state *or political subdivision thereof,*" or a majority of its shares must be owned by a "foreign state *or political subdivision thereof.*" (Emphasis added).

Moreover, the legislative history repeatedly draws the same distinction. In the House Report Congress stated:

> The second criterion requires that the entity be either an organ of a foreign state *(or of a foreign state's political subdivision)*, or that a majority of the entity's shares or other ownership interest be owned by a foreign state *(or by a foreign state's political subdivision)*. If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state *or by a foreign state's political subdivision.*

1976 U.S.C.C.A.N. 6604, 6614 (emphasis added).

[5] Indeed, our reluctance to put words in Congress' mouth is especially justified here because Congress seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or

instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision *or an agency or instrumentality* of a foreign state or political subdivision. It did not. Moreover, a contrary reading of the statute could expand immunity far beyond what Congress intended. As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.[3] Although such a broad view of sovereign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

[6] In sum, we hold that Alberta Pork is an agency or instrumentality under the Act and thus is immune from jurisdiction unless one of the Act exceptions applies. However, FFF cannot be considered an agency or instrumentality and thus is entitled to no protection from the Act.[4]

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[3] This is because each subsidiary would be owned by an agency or instrumentality.

[4] Consequently, we need not reach the GGFF employees' contention that FFF waived its immunity.

IV

[7] As an agency or instrumentality of a foreign state, Alberta Pork is entitled to immunity unless it falls into one of the Foreign Sovereign Immunities Act's exceptions to immunity. Once a plaintiff offers evidence that an Act exception applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. *Joseph v. Office of Consulate General of Nigeria,* 830 F.2d 1018, 1021 (9th Cir. 1987), *cert denied,* 485 U.S. 905 (1988).

[8] The Act was intended to codify the so-called "restrictive" principle of sovereign immunity. 1976 U.S.C.C.A.N. at 6605. "Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." *Id.* Accordingly, the Act provides that foreign states which are engaging in commercial activity are not immune from the jurisdiction of the United States courts. Specifically, a court has jurisdiction in any case in which the action is based

> upon a commercial activity carried on in the United States by the foreign state; or
>
> upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
>
> upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

[9] In determining the commercial character of an activity, the Act directs courts to examine the nature of the act or course of conduct, rather than the purpose. 28 U.S.C. § 1603(d). Further, it is not enough for the defendant merely to have engaged in a commercial activity. Rather, the statutory language requires that the plaintiff's cause of action be "based upon" the commercial activity in question. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1477 (1993). Thus, a court must "focus only on those *specific* acts that form the basis of the suit" to determine whether those acts constitute or are in connection with the commercial activity. *Joseph*, 830 F.2d at 1023 (emphasis in original).

Here, the district court determined that Alberta Pork fell into the commercial activities exception and was therefore not immune. The district court had previously held that COBRA's definition of "employer" applied to the GGFF employees' COBRA and ERISA claims, and that Alberta Pork was an "employer" of the GGFF employees for the purposes of COBRA.[5] Based on that conclusion,

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[5] COBRA provides that an "employer" includes corporations within a "controlled group of corporations," defined as any group of

> (1) *Parent-subsidiary control group.* One or more chains of corporations connected through stock ownership with a common parent corporation if
>
> (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent

the district court held that the activity at issue here was Alberta Pork's employment of the GGFF employees. Because the employment of United States residents is well-established as constituting a commercial activity, 1976 U.S.C.C.A.N. at 6615; *see also State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), and because the GGFF employees' claims stemmed from their employment, the district court concluded that the claims were "based upon" the relevant commercial activity. Accordingly, the court denied the defendants' motion to dismiss for lack of subject matter jurisdiction.

[10] We disagree with the district court's analysis. By referring to COBRA's definition of employer to determine whether the court had jurisdiction under the Act, the district court placed the substantive cart before the jurisdictional horse. A court can apply the substantive portions of a statute only after it has *independently* determined that it has jurisdiction. For example, in *NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1065 (1994), the Second

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> corporation, is owned . . . by one or more of the other corporations; and
>
> (B) the common parent corporation owns . . . stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

26 U.S.C. § 1563(a)(1).

Circuit held that "[b]efore a federal court may apply corporate law, or the controlled group provisions of ERISA or any other rule of law in a case involving a foreign state or instrumentality of that state, it must, as a threshold matter, find an exception to the [Act]'s grant of sovereign immunity." *Id.* at 39. We agree with the Second Circuit that it is improper to rely on a substantive law as a basis for a finding of jurisdiction under the Act.

[11] Moreover, even if it were appropriate as a general matter to look to substantive law for guidance in the Act inquiry, such an inquiry cannot be upheld in the instant case. The Supreme Court has held that the Act presumes that separate juridical entities are normally to be treated as independent from one another. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) ("*Bancec*"). In *Bancec* the Supreme Court stated:

> [d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.

Id. (citation omitted). *See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1104 (9th Cir. 1990). The *Bancec* Court went on to articulate two exceptions to the presumption of independence, however: (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"; or (2) where to give effect to the entities' separate form " 'would work fraud or injustice.' " 462 U.S. at 629 (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)).

The Act's presumption of independence is in tension with COBRA's definition of "employer." That is, *Bancec* holds that entities are presumed to be independent unless a showing of domination and control is made. By contrast, COBRA determines a parent corporation's liability, not by examining how much actual control the parent exercised over the subsidiary, but solely by reference to the parent's stock ownership of the subsidiary.

The GGFF employees do not dispute that the presumption of independence is in tension with COBRA's definition of "employer"; however, they maintain that the presumption of independence simply is not applicable in a case involving a "violation of a remedial statute which specifically rejects the notion that a parent corporation can avoid the liability of its subsidiary for failure to offer employees health insurance continuation rights." That is, according to the GGFF employees, COBRA's derivative liability provisions trump the Act's normal presumption of independence.

Although the GGFF employees' argument has some logical appeal, we must reject it. The Act's presumption of independence is rooted in principles of international law: comity, sovereignty, and the equality of sovereigns. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (noting that "the doctrine of foreign sovereign immunity is rooted in two bases of international law, the notion of sovereignty and the notion of the equality of sovereigns") (internal quotations omitted), *cert. denied*, 113 S. Ct. 1812 (1993). In *Chuidian*, this court stated that the Act's presumption of juridical separateness is based on "due respect for the actions taken by foreign sovereigns," "principles of comity," and

the notion that "[i]f U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." 912 F.2d at 1104 (citations omitted). We will not presume, without explicit congressional instruction, that Congress intended to contravene these fundamental principles in enacting COBRA.

Having determined that the district court's reliance on COBRA was inappropriate, we must now examine whether Alberta Pork engaged in commercial activities, without reference to COBRA's definition of "employer," that would place it into the Act's commercial activities exception. As noted above, we will not find jurisdiction merely because Alberta Pork engaged in a commercial activity. Rather, jurisdiction is proper only if the GGFF employees' legal claims are based upon the commercial activity in question. *See Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1477 (1993).

[12] The GGFF employees allege five claims under COBRA, ERISA, and WARN. All of these claims arose out of GGFF's termination of the GGFF employees' health care coverage and termination of the GGFF employees' employment. Thus, in order to assert jurisdiction over Alberta Pork, we must conclude that Alberta Pork engaged in a commercial activity that forms the basis for the GGFF employees' employment-based claims. This we are unable to do.

[13] Alberta Pork can be seen as engaging in two types of commercial activities. First, Alberta Pork sells

hogs to pork processors in the United States. This commercial activity is not a sufficient basis for jurisdiction, however, because hog sales are unrelated to the GGFF employees' employment claims. Second, Alberta Pork owned, through subsidiaries, GGFF. Although such ownership could provide a basis for jurisdiction if it were determined that Alberta Pork was involved in the employment decisions in controversy, mere stock ownership, without more, does not create any relationship to the GGFF employees' claims, especially given the Act's presumption that separate juridical entities are to be treated as such.

[14] The record contains no evidence to suggest that Alberta Pork was involved in GGFF's decision to cancel its Plan and to close its plant. There is no evidence that GGFF shared officers and directors with Alberta Pork. Nor is there any evidence that Alberta Pork participated in any decisions concerning GGFF's operations. Thus, we conclude that because Alberta Pork's commercial activities are unrelated to the GGFF employees' claims, Alberta Pork does not fall into the Act's commercial activities exception.

V

Finally, the GGFF employees contend that Alberta Pork has waived its immunity. The Act provides that a foreign state shall not be immune from the jurisdiction of United States courts if "the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign

state may purport to effect except in accordance with the terms of the waiver." 28 U.S.C. § 1605(a)(1).

This court has held that the waiver exception must be narrowly construed. *Joseph*, 830 F.2d at 1022. Generally speaking, implicit waivers are found only where (1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that the law of a particular country should govern the contract; or (3) a foreign state has filed a responsive pleading without raising the defense of sovereign immunity. *Id.*

The GGFF employees maintain Alberta Pork waived immunity "by participating in loan and credit transactions . . . which expressly provide for jurisdiction of the United States courts." The GGFF employees call particular attention to the "credit arrangements undertaken for the sole and exclusive purpose of funding GGFF Lodi plant operations."

[15] The GGFF employees' argument is not persuasive, however. As Alberta Pork points out, the GGFF employees' theory seems to be that if a foreign state enters into one agreement as to which it waives immunity, then the foreign state has implicitly waived immunity for all of its other transactions, regardless of how unrelated the transactions are to one another. Such a theory does not comport with the narrow construction that the waiver exception must receive. Just because Alberta Pork may have agreed to submit to the jurisdiction of United States courts in connection with a loan

collection action by a bank in Washington State,[6] it does not in any way mean that they also agreed to submit to the jurisdiction of United States courts in connection with a dispute involving GGFF employees in California. Thus, we conclude that Alberta Pork did not waive its immunity under the Act.

VI

Foreign sovereign immunity is premised on comity and respect for the equality and independence of sovereigns. Although the United States has enacted the restrictive principle of sovereign immunity, whereby foreign states do not enjoy immunity over claims based on their commercial activities, a foreign state does not lose its immunity under the Foreign Sovereign Immunities Act merely by engaging in some commercial conduct no matter how unrelated to the cause of action in question. Because the GGFF employees' employment-based claims are not related to Alberta Pork's commercial activities, Alberta Pork is immune from jurisdiction.

By contrast, we conclude that the district court correctly exercised jurisdiction over FFF because FFF does not meet the statutory definition of a foreign state and thus is afforded no protection from the Foreign Sovereign Immunities Act.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party to bear its own costs.

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[6] This fact is in controversy, in any event. Although FFF clearly entered into such loan agreements, Alberta Pork's role in GGFF's financing is less clear.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN GATES; ROBERT KINSER; CLIFFORD TRAVIS; DENNIS CONRAD; RICHARD DOBLE; EDMUND VINCELET; RICHARD WEYANT and JEROME BINDER; JEROME BINDER, [sic] individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. VICTOR FINE FOODS, GOLDEN GATE FRESH FOODS, INC., Defendant, and FLETCHER'S FINE FOODS; ALBERTA PORK PRODUCERS DEVELOPMENT CORPORATION, Defendants-Appellants.	No. 93-16141 D.C. No. CV-92-00095-LKK ORDER (Filed Jun. 22, 1995)

Before: TANG and O'SCANNLAIN, Circuit Judges; MERHIGE,* District Judge.

* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The panel has voted to deny the petition for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc, and Judges Tang and Merhige have so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN GATES, et al.,

Plaintiffs,

v.

VICTOR FINE FOODS, et al.,

Defendants.

_____/

NO. CIV. S-92-095 LKK

ORDER

(Filed May 24, 1993)

I

UNDISPUTED FACTS AND PROCEDURAL BACKGROUND

On November 20, 1991, defendant Golden Gate Fresh Foods, Inc. ("Golden Gate") terminated the Victor Fine Foods Group Benefits Plan ("Victor Plan"). Shortly thereafter, the Victor Fine Foods meat packing plant in Lodi, California was closed.

This action on behalf of a class consisting of over 300 former employees and their dependents followed. It is brought under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-09; the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 29 U.S.C. §§ 1161-67 (West Supp. 1993); and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1371. Named as defendants are Victor Fine Foods ("Victor Food"), Golden Gate, Fletcher Fine Foods, ("Fletcher"), Alberta Pork Producers Development

Company ("Alberta Pork"), various officers of those corporations, the Victor Plan, Assured Investors Life Co., administer of the Plan, and Anthem Life Ins. Co.

On July 20, 1992, this court heard several of defendants' motions for judgment on the pleadings and to strike plaintiffs' jury demands. Those motions were disposed of in an order dated September 2, 1992. *See Gates v. Victor Fine Foods*, Civ. S-92-095 LKK, Order filed September 2, 1992 ("Order"). At the April 19, 1993 law and motion, the court orally granted certification of the class.[1]

Now before the court are defendants Victor Food, Golden Gate, Fletcher, Duckenfield, Victor Plan and Alberta Pork's motion for summary judgment on the COBRA claim;[2] plaintiffs' cross-motion for partial summary judgment on the COBRA claim; defendant Knoedler's motions, nearly identical to those disposed of in my prior order; defendants Alberta Pork and Fletcher's motions for dismissal for lack of subject matter jurisdiction, or in the alternative, for summary judgment on the WARN claim; and plaintiffs' cross-motion for partial summary judgment that subject matter jurisdiction exists. Those motions are disposed of herein.

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[1] The order applied to all four claims, but was made subject to the right of defendants to move for decertification upon completion of discovery.

[2] Defendant Duckenfield's motion for judgment on the pleadings on the COBRA claim has already been granted, as has Victor Food's motion for summary judgment on the COBRA claim. Defendant Knoedler has joined in this motion.

II

STANDARDS

A. Summary Judgment Standards Under Fed. R. Civ. P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System*, 368 U.S. 464, 467 (1962); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* at 322. "[A] complete failure of proof concerning an essential

element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); *Matsushita*, 475 U.S. at 586 n.11; *First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 242 U.S. 248-49; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 290; *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *Poller*, 368 U.S. at 468; *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some

metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (citation omitted).

B. Standards on a Motion for Judgment on the Pleadings

A motion for judgment on the pleadings may be brought "[a]fter the pleadings are closed but within such time as to not delay the trial." Fed. R. Civ. P. 12(c). All allegations of fact by the party opposing a motion for judgment on the pleadings are accepted as true. *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 (9th Cir. 1984). A "dismissal on the pleadings for failure to state a claim is proper only if 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.' " *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure, Civil § 1368, at 690 (1969)); *see also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

When a Rule 12(c) motion is used to raise the defense of failure to state a claim, the motion is subject to the same test as a motion under Rule 12(b)(6). *McGlinchy*, 845 F.2d at 810; *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1989). Thus, the motion will be granted only if the movant establishes that "no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Newman v. Universal Pictures*, 813 F.2d 1519, 1521-22 (9th

Cir. 1987). The court must accept all material allegations of the complaint as true and all doubts must be resolved in the light most favorable to the plaintiff. *N.L. Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

However, "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(c).

III

COBRA CLAIMS

The 1986 amendments to ERISA, codified at 29 U.S.C. §§ 1161-68 (West Supp. 1993) ("COBRA"), require employers operating ERISA group health plans to offer continuation coverage to all qualified beneficiaries, who would, but for the provisions of the statute, lose health benefits by virtue of certain specified events, including being laid-off.[3] The purpose of these provisions is to afford employees who lose their jobs continued medical coverage at lower group rates.

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[3] "The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan." 29 U.S.C. § 1161.

Under COBRA, when a qualifying event such as the termination of employment occurs, the employer must notify the plan administrator of its occurrence. 29 U.S.C. §§ 1163, 1166. The plan administrator is then to notify the qualified beneficiaries of their rights under COBRA for continuation coverage. 29 U.S.C. § 1166. The continuation coverage extends for a maximum period of 18 months but ends upon the employer's ceasing to provide any group health plan. 29 U.S.C. § 1162(2)(B).

Plaintiffs' second claim alleges that defendants failed both to notify plaintiffs of their right to elect continuation coverage, Complaint ¶ 34, and to actually provide them with the opportunity to purchase the same. Complaint ¶ 33.

Defendants move for summary judgment on the COBRA claim, contending that as a matter of business judgment they had any absolute right to terminate the Victor Plan, and that after the termination of the Victor Plan there were no qualified beneficiaries entitled to continuation coverage. Plaintiffs cross-move for partial summary judgment. They acknowledge that the Victor Plan is no longer in existence, but contend that other corporations which are their employers for COBRA purposes continue to provide group health plans, and conclude that they are entitled to continuation coverage. Plaintiffs seek partial summary judgment on the following issues: (1) that Fletcher, Golden Gate, Alberta Pork, and their affiliated entities, Fletcher's Inc., Fletcher's Lodi Management Co., Ltd. ("Fletcher's Lodi") and Golden Gate Financial Services, Inc. ("Financial Services") are employers within the meaning of COBRA; (2) that employees terminated both before and after

November 20, 1991, and their dependents are qualified beneficiaries for COBRA purposes; and (3) that those qualified beneficiaries have a right to continuation coverage because their employers continue to provide group health plans to employees. In the alternative, plaintiffs argue that summary judgment in favor of defendants is inappropriate because they are entitled to further discovery under Fed. R. Civ. P. 56(f).

There is no dispute that the Victor Plan was a qualified group health plan, that Golden Gate was a plan sponsor and, except to the extent that defendants deny plaintiffs and their dependents were covered under the group health plan when they were terminated, that termination of employment was a qualifying event. Whether plaintiffs are qualified beneficiaries entitled to continuation coverage thus turns on whether named defendants are plaintiffs' employers for purposes of COBRA, and if so, whether they continue to offer a qualified group health plan to their employees.

A. Were the Employees and their Dependents "Qualified Beneficiaries?"

Under the statute, a qualified beneficiary is "any individual who, on the day before the qualifying event for that employee, is a beneficiary under the plan [in relation to the covered employee]." 29 U.S.C. § 1167(3)(A). Both parties agree that coverage under the Victor Plan was terminated on November 20, 1991.

The qualifying event for plaintiffs is the termination of employment, a date which differs for the various class plaintiffs. Defendants do not dispute that employees who

were terminated on or before November 19, 1991, were covered employees.[4] Thus, plaintiffs' motion for summary judgment that all plaintiffs terminated on or before November 20, 1991, and their dependents, are qualified beneficiaries within the meaning of COBRA is granted.

Plaintiffs contend that employees terminated after November 20, 1991, are also qualified beneficiaries.[5] They argue that the November 20, 1991 Victor Plan termination date should be disregarded in determining who is a qualified beneficiary because it was done in anticipation of the plant closing. In support of their position, they direct the court's attention to certain proposed Treasury Department regulations. 52 Fed. Reg. 22,725 (1987) (to be codified at 26 C.F.R. Pt. 1) (proposed June 15, 1987).[6]

Defendants contend that the plain meaning of the statute mandates a different conclusion. They also argue that no deference should be accorded the proposed rule since it is not final; the department promulgating the rules had no expertise in the area; the rule is interpretative and not entitled to deference; or that the rule is

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[4] Employees terminated on November 20, 1991, were covered employees on the day before the qualifying event, and are therefore also qualified beneficiaries.

[5] According to Golden Gate, all named plaintiffs fall into this category. Duckenfield Decl. at 2.

[6] The pertinent proposed regulation reads in part, "[i]f coverage is reduced or eliminated in anticipation of an event, the reduction or elimination is disregarded in determining whether the event causes a loss of coverage." 52 Fed. Reg. at 22,725.

legislative, and as such invalid because it was not promulgated pursuant to the APA.[7]

In the absence of binding authority, the first step in determining the meaning of a statute is examination of the text, followed if necessary, by examination of the legislative history. *See, e.g., INS v. Cardoza-Fonseca* 480 U.S. 421 (1987) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-45 (1984)) ("[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *see also Church of Scientology of California v. United States Dep't of Justice,* 612 F.2d 417, 421 (9th Cir. 1979). If the language of the statute is not clear, resort may be had to textual and extrinsic aids of construction, and administrative interpretations then become relevant. *See, e.g., INS*

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[7] The courts have provided varying degrees of deference to the proposed regulations. *See Communications Workers of America v. NYNEX Corp.,* 898 F.2d 887 (2d Cir. 1990) (relying on the proposed regulations without discussion of the degree of deference to be afforded); *Oakley v. City of Longmont,* 890 F.2d 1128 (10th Cir. 1989), *cert. denied,* 494 U.S. 1082 (1990) (noting that the proposed rules did not alter the court's plain reading of the statute and finding them unpersuasive until the agency completes formal rulemaking and promulgates final regulations); *Swint v. Protective Life Ins. Co.,* 779 F. Supp. 532, 554 (S.D. Ala. 1991) (considering the proposed regulations indicative of the Treasury Department official policies regarding continuation coverage and giving them great judicial deference); *Johnson v. Reserve Life Ins. Co.,* 765 F. Supp. 1478 (C.D. Cal. 1991) (applying the proposed treasury regulation because they represent a reasonable interpretation from the agency charged with enforcement of the statute).

v. Cardoza-Fonseca, 480 U.S. 421 (1987), *Catholic Social Services v. Meese*, 685 F. Supp. 1149 (E.D. Cal.), *aff'd*, 956 F.2d 914 (9th Cir. 1992). If interpretation by the agency charged with the enforcement of the statutory scheme is consistent with the statutory purpose and language, it is entitled to substantial deference. *See Chevron*, 467 U.S. at 483.

The plain language of the statute here does not address the issue at bar. While defining a qualified beneficiary as an individual who on the day before being terminated was covered by a group health plan, the statute simply does not address the situation where a plan is terminated in anticipation of mass layoffs or of a plant closing. "[W]here the text [of a statute] fails to address the issue pertinent to decision an ambiguity exists." *United States v. Veon*, 538 F. Supp. 237, 243 (E.D. Cal. 1982), *citing Busic v. United States*, 446 U.S. 398, 407 (1980). I thus turn to various aids of construction. As I explain below, the legislative history, standard canons of construction and, to a limited extent, the proposed rule all persuade me that a construction of the statute ignoring terminations made in contemplation of plant closings in determining who is a qualified beneficiary is appropriate.

The legislative history demonstrates a congressional directive to adopt regulations requiring that termination of group health plans made in contemplation of plant closings be ignored for COBRA purposes. *See* 1986 U.S. Code Cong. & Ad. News at 324 ("the regulations are to include rules precluding an employer from reducing or eliminating coverage in anticipation of the plant closing."). This manifestation of congressional intent is quite compelling.

Moreover, it is clear that something like the proposed rule is indispensable to a successful effectuation of congressional purpose where a plant closing was anticipated. Without some such rule, an employer could always terminate a plan in anticipation of mass lay-offs and thus avoid its obligations under the statute. A statute must be construed to make its provisions effective. *United States v. Nordic Village*, 112 S. Ct. 1011, 1015 (1992). The remedial nature of the statute also counsels for a construction of the statute ignoring termination of a group health plan in contemplation of a plant closing for purposes of determining who is a qualified beneficiary. *See National Companies Health Bene. Plan v. St. Joseph's Hosp.*, 929 F.2d 1558, 1569 (11th Cir. 1991) ("Congress enacted COBRA because it was concerned about the fate of individuals who, after losing coverage under their employer's ERISA plan, had no group health coverage at all."). COBRA's point was to put the burden of providing continuation coverage on an employer who has terminated a plan rather than on the employee. *See Coble v. Bonita House, Inc.*, 789 F. Supp. 320, 323 (N.D. Cal. 1992) (the commitment to employer-based health care program is the policy underlying COBRA).

Finally, I find the proposed Treasury rule has some limited persuasive value in confirming my analysis. Although the rule is not final and is labeled interpretative, COBRA directs the Secretary to proscribe regulations to carry out its provisions, *see* 29 U.S.C. § 1168, 26 U.S.C. § 7801, and the legislative history more specifically directs the "Secretary of the Treasury to prescribe rules defining the appropriate continuation coverage for qualified beneficiaries under a plan terminated in connection with a plant closing." 1986 U.S. Code Cong. & Ad. News

at 324. *See also Johnson v. Reserve Life Ins. Co.*, 765 F. Supp. at 1482.

Defendants' argument that such an interpretation conflicts with 29 U.S.C. § 1162(2)(B) is unpersuasive. Defendants contend that because the end of an employment benefits plan always anticipates a loss of benefits, the interpretation would never permit an employer to terminate a plan. Defendants are mistaken. That plaintiffs are qualified beneficiaries does not guarantee them continuation coverage. An employer is under no obligation to offer such coverage to qualified beneficiaries if it has ceased to provide any group health plan to any employee within the meaning of the statute. Of course, to the extent an employer continues to offer coverage to other employees, it must provide coverage to employees of a terminated plant. That result, of course, is what Congress intended.

I conclude that termination of the group health plan in contemplation of a plant closing may be disregarded in determining who is a qualified beneficiary. Because the facts demonstrate that the plan elimination was done in anticipation of the plant closure, I find that employees terminated after November 20, 1991 in connection with the plant closure, and their dependents are qualified beneficiaries within the meaning of COBRA. Plaintiffs' motion for partial summary judgment on this issue is therefore granted.

B. Who is an Employer for COBRA Purposes?

Having determined that all of the terminated employees and their dependents are "qualified beneficiaries," I must next determine whether their employer maintains a group health plan, thus entitling them to certain rights under COBRA.

COBRA expressly provides that an employer's obligation to provide continuation coverage ends "[t]he date on which the employer ceases to provide any group health plan to any employee." 29 U.S.C. § 1162(2)(B). Plaintiffs contend that all defendant corporations fall within COBRA's definition of employer, *see* 29 U.S.C. § 1167(4), or alternatively, under ERISA's definition of employer, *see* 29 U.S.C. § 1002(5), and continue to provide group health plans to employees. They conclude that 29 U.S.C. 1162(2)(B) is inapplicable to the case at bar. I begin with an examination of which definition of employer the court must apply to resolve the issue before it.

For purposes of determining who is an employer under COBRA, the definitions found in 26 U.S.C. § 414(n) & (t) "shall apply." 29 U.S.C. § 1167(4). "Fundamental maxims of statutory construction require that . . . [a] specific statutory provision will govern even though general provisions, if standing alone, would include the same subject." *Monte Vista Lodge v. Guardian Life Ins. Co.*, 384 F.2d 126, 129 (9th Cir. 1967), *cert. denied*, 390 U.S. 950 (1968). The COBRA definition of employer is the more specific section and, accordingly, COBRA's definition must prevail over ERISA's broader definition. *See Kidder v. H&B Marine, Inc.*, 932 F.2d 347 (5th Cir. 1991); *but see Local 217 v. MHM, Inc.*, 805 F. Supp. 93, 113 (D. Conn.),

aff'd, 967 F.2d 805 (2d Cir. 1992). For purposes of COBRA, an employer includes corporations within a "controlled group of corporations,"[8] defined as any group of

> (1) One or more chains of corporation connected though stock ownership with a common parent corporation if
>
> > (A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of share of all classes of stock of each of the corporation except the common parent corporation, is owned . . . by one of [sic] more of the other corporation; and[9]
> >
> > (B) the common parent corporation owns stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the

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[8] This results from 29 U.S.C. § 1167(4)'s provision that 26 U.S.C. § 414(n) & (t) "shall apply for purposes of this part in the same manner and to the same extent as such subsections apply for purposes of [26 U.S.C. § 106]." 29 U.S.C. § 1167(4). The section relevant to our inquiry, 26 U.S.C. § 414(t), provides in part that "employees who are treated as employed by a single employer under subsection (b) . . . shall be treated as employed by a single employer for purposes of [26 U.S.C. § 106]." Subsection (b) provides that "employees . . . of a controlled group of corporations [as defined by § 1563(a)] shall be treated as employed by a single employer." 26 U.S.C. § 414(b).

[9] Whether a stock is "owned" is determined by 26 U.S.C. § 1563(d)(1), providing that "[f]or purposes of determining whether a corporation is a member of a parent-subsidiary controlled group of corporations . . . stock owned by a corporation means stock owned directly by such corporation, and stock owned [by option, partnership, or by estates or trust]."

> total value of share of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

26 U.S.C. § 1563(a)(1).

Here, it is undisputed that Alberta Pork owns 100% of Fletcher's outstanding stock. Fletcher owns 100% of the outstanding stock of Fletcher's Inc. ("Fletcher's Inc."). Fletcher's Inc. owns 100% of Fletcher's Lodi. All of Golden Gate's stock was acquired by Golden Gate Financial Services. Fletcher's Inc. owns 76.5% of Golden Gate's outstanding stock. Fletcher's Lodi owns 23.5% of Golden Gate's outstanding voting stock. Thus, at least 80% of stock in each corporation is owned by one or more of the other corporations, and the common parents own at least 80% of at least one of the corporations.[10] Under these circumstances, both Alberta Pork and Fletcher are "employers" within COBRA's definition. Plaintiffs' motion for partial summary judgment on whether

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[10] Below I attempt to diagram the obscure relationship between the various corporate entities:

Alberta Pork
100%

Fletcher
100%

Fletcher's Inc.
76.5% 100%

Financial Services < 23.5% Fletcher's Lodi
100%

Golden Gate

Alberta Pork and Fletcher are employers under COBRA is therefore granted.[11]

C. Do Either Alberta Pork or Fletcher Offer a Group Health Plan to any Employee?

Having determined that Alberta Pork and Fletcher are employers for COBRA purposes, I must next determine whether either of them provides a group health plan to any employee. 29 U.S.C. § 1162(B). Absent such a plan, defendants' obligations under COBRA to provide continuation coverage ended on the date the Victor Plan was terminated.[12]

COBRA defines a group health plan as "an employee welfare benefit plan providing medical care . . . to participants or beneficiaries directly or through insurance, reimbursement, or otherwise." 29 U.S.C. § 1167(1). An employee welfare benefit plan is more specifically defined by ERISA as any "plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants . . . medical, surgical, or hospital care or benefits." 29 U.S.C. § 1001(1). Resolution

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[11] To the extent plaintiffs seek a determination that Fletcher's Inc., Fletcher's Lodi, and Golden Gate, entities not parties to this suit, are employers under COBRA, their motion is denied.

[12] The obligation to offer continuation coverage ends on "[t]he date on which the employer ceases to provide any group health plan to any employee." 29 U.S.C. § 1162(B).

of this motion turns on whether Alberta Pork or Fletcher, Canadian corporations, maintain such a plan.[13]

"The existence of [an ERISA] plan is a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." *Harper v. American Chambers Life Ins. Co.*, 898 F.2d 1432, 1433 (9th Cir. 1990), *citing Kanne v. Connecticut Gen. Life Ins.*, 867 F.2d 489, 492 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Because plaintiffs provide no evidence that Alberta Pork has an employee benefits plan, their motion for partial summary judgment as to Alberta Pork on this issue must be denied.

Plaintiffs argue that Fletcher provides hourly wage employees coverage under a health benefits plan. Defendants admit that Fletcher provides hourly wage employees with certain limited excess benefits pursuant to a negotiated union contract, but deny that Fletcher provides basic coverage under a group health plan. In support, defendants provide an affidavit that the basic medical and hospital coverage provided to Fletcher employees is provided to all Canadian citizens through the Canadian national medicare program. Consequently, I

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[13] Of course, the provisions of ERISA do not apply to "plan[s] maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens." 29 U.S.C. § 1003(b)(3). *See* Dep't of Labor Op. 81-85A (July 1, 1981) (LEXIS, Labor Library, ERISA file) (plan for Canadian residents is not covered by ERISA). The issue, however, is not whether ERISA's provisions apply to the Canadian plan, but rather whether the Canadian plan falls within the definition of a plan for ERISA purposes thus giving rise to potential COBRA liability.

am informed, Fletcher employees in Alberta are covered under the Alberta Health Program, and Fletcher employees in British Columbia are covered under the Medical Services Plan which is part of Canada's national health insurance plan. Duckenfield Decl. in Supp. of Mot. ¶ 29; Storch Decl. in Supp. of Mot., passim. This evidence suffices to raise an issue of fact concerning Fletcher's provision of health benefits under a plan. Plaintiffs' motion for partial summary judgment on the issue of whether Fletcher continues to offer group benefits plans must be denied.[14]

Although defendants have not moved for partial summary judgment on the subsidiary COBRA issues (see note 14), they have moved for summary judgment on that claim in general. For the reasons explained in that note, their motion appears not well-taken as to Fletcher. As to the other defendants, it appears that such a motion is premature. Plaintiffs argue that summary judgment

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[14] The court believes that defendants have not moved for summary judgment on this particular issue. Accordingly, I do not address whether defendants have presented enough evidence to merit summary judgment. I note, however, that other evidence appears to create an issue of fact. First, Fletcher's employees apparently enjoy health benefits for eye care and dental coverage apparently not part of the national plan. Duckenfield Decl. in Opp'n to Plaintiffs' Mot., Ex. I at 52. Moreover, the Bargaining Agreement provides that "new employees have a 90 working day waiting period before becoming eligible for the [Medical Services Plan of British Columbia]." *Id.* at 51. This appears to be because the company pays the premiums for the Medical Services Plan. *Id.* at 52 ("The Company shall continue to pay the premiums for M.S.P."). Under these circumstances, doubt exists that all Canadians are enjoying these benefits pursuant to law rather than company-supplied benefits.

would be inappropriate because genuine issues of material fact exist as to critical issues on plaintiffs' second claim for which they have a right under Fed. R. Civ. P. 56(f) to further discovery.

Federal Rule of Civil Procedure 56(f) is to be applied liberally. 10A Wright, Miller & Kane, Federal Practice and Procedure § 2740. ("The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective."). The Ninth Circuit has explained that district courts are to generally grant 56(f) applications where the opposing party makes (a) a timely application which (b) specifically identified (c) relevant information, (d) where there is some basis for believing that the information sought actually exists. *VISA Intern. Service v. Bankcard Holders*, 784 F.2d 1472, 1475 (9th Cir. 1986).

Defendants argue that plaintiffs have failed to meet their burden of specifically showing what facts they hope to discover which will preclude summary judgment, *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades*, 817 F.2d 1391, 1395 (9th Cir. 1987), and that in any event, the information plaintiffs seek is irrelevant. In support, they contend that pursuant to this court's Status Order of July 20, 1992, no new parties may be added to the suit. Consequently, they contend that plaintiffs' discovery as to potentially new parties is irrelevant.[15] At oral argument, however, plaintiffs explained that they

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[15] Defendants also point out that at the time of the status conference plaintiffs had notice of the existence of the various other companies.

seek further discovery on the relationship of Fletcher's Inc., Fletcher's Lodi, and Financial Services to the other defendants, and on whether any of these companies offer ERISA plans. That information is directly relevant to the COBRA claim. For that reason, plaintiffs' 56(f) request is herein granted.

IV

KNOEDLER'S MOTION FOR JUDGMENT ON THE PLEADINGS

At the time of this court's September 2, 1992 Order, defendant Knoedler was contesting the court's exercise of personal jurisdiction. On July 24, 1992, Knoedler filed his answer to the complaint. He now seeks to have the rulings in that order applied to him. Knoedler asserts, and plaintiffs agree, that with regard to these motions Knoedler's interests are identical to those of defendant Duckenfield and should be resolved on a consistent basis. Both Knoedler and Duckenfield were alleged to be officers of Victor Foods, Golden Gate and Fletcher, and both were alleged to be fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A) with respect to the Plan. I herein affirm my previous rulings on Duckenfield's motions and apply them to defendant Knoedler.

A. WARN Act

Knoedler seeks judgment on the pleadings that he is not an "employer" within the meaning of the WARN Act with regards to plaintiffs' first claim. In my September 2, 1992 Order, I deferred ruling on this issue. Because the purpose of Knoedler's motions are to apply the court's

previous decisions to himself, there is no reason to address this aspect of the motion.

B. ERISA Claims

Knoedler next seeks judgment on the pleadings that he is not an employer within the meaning of ERISA with respect to plaintiffs' second, third and fifth claims. In my previous order, I granted defendant Duckenfield's motion on plaintiffs' second (COBRA) claim on the grounds that plaintiffs had not alleged Duckenfield to be one of the groups upon which COBRA imposes obligations, i.e., a plan, plan sponsor, employer, or plan administrator. Plaintiffs also fail to allege that Knoedler falls into one of those categories. Therefore, Knoedler's motion for judgment on the pleadings as to the second claim is granted.

I also previously granted Duckenfield's motion for judgment on the pleadings as to plaintiffs' fifth claim under ERISA because he was not an employer within the meaning of ERISA. Plaintiffs made no argument on this motion and this court previously construed that to be a concession that the motion should be granted. Plaintiffs now file no further papers on this claim. Consequently, Knoedler's motion as to plaintiffs' fifth claim is also granted.

Defendant Duckenfield's motion as to plaintiffs' third claim was denied because plaintiffs had alleged Duckenfield to be a fiduciary within the meaning of 29 U.S.C. § 1002(21)(A), and plan fiduciaries may be sued for denial of benefits. In so ruling, I noted that Duckenfield had attempted to convert his motion for judgment on the pleadings into a motion for summary judgment, *see* Fed.

R. Civ. P. 12(c), but that I refused to permit conversion because he attempted to rely on new matters for the first time in his reply memo, thus depriving plaintiffs of an opportunity to respond.

Knoedler, in his reply brief, now claims that because he incorporated Duckenfield's reply memorandum, plaintiffs had an opportunity to respond to the consequences of their interrogatory answers, yet elected not to do so. He argues that the relevant facts were already in the court's record, and the arguments based thereon were available to plaintiffs at the time Knoedler filed his motion for judgment on the pleadings. I cannot agree.

Plaintiffs filed their responsive pleadings on September 1, 1992, incorporating by reference their response to the motions filed by Duckenfield and agreeing that Knoedler's motion should be resolved on a consistent basis with Duckenfield's. This court's order was not released until September 2, 1992. Defendants' request that the court take the information into consideration appears in the reply brief and plaintiffs were without notice to defend a summary judgment motion. For that reason, I decline to convert this into [sic] motion into one for summary judgment.

Defendant posits that the court need not convert Knoedler's motion into a summary judgment motion when it considers plaintiffs' interrogatory answers. I disagree. Rule 12(c) provides that "if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Fed. R. Civ. P. 12(c). Plaintiffs' responses to interrogatories are

outside the pleadings. Knoedler's motion for judgment on plaintiffs' third claim is denied. He is, of course, free to move for summary judgment in reliance on this evidence.[16]

In my previous order, I denied defendants' motion for judgment on the pleadings as to plaintiffs' fourth claim for breach of fiduciary duty. That order is affirmed as to defendant Knoedler.

C. Jury Trial

I previously granted defendants' motion to strike the jury demand on plaintiffs' second, third, fourth and fifth claim, but denied the motion with regard to plaintiffs' first claim. Those ruling [sic] are affirmed as to defendant Knoedler.

D. Damages

In my earlier order, I granted defendants' motion for summary judgment on plaintiffs' demand for extra-contractual damages on all claims in the complaint. That ruling is now applied to defendant Knoedler.

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[16] Knoedler also argues that because a 12(c) motion is subject to the same test as a 12(b)(6) motion, the court is permitted to consider matters of which it may take judicial notice. He contends that because material already existing in a court's own files are judicially noticeable, the court can and should consider plaintiffs' interrogatory answers to Knoedler's motion. Because plaintiffs would be left without an opportunity to respond, I decline to do so.

V

SUBJECT MATTER JURISDICTION

Defendants Alberta Pork and Fletcher move to dismiss plaintiffs' complaint for lack of subject matter jurisdiction on the grounds that they are entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11 (West Supp. 1993).[17] Plaintiffs in turn cross-move for partial summary judgment on various issues related to the court's subject matter jurisdiction.[18]

The FSIA provides the sole basis for jurisdiction over foreign states,[19] declaring foreign states immune from the

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[17] Plaintiffs argue that defendants' assertion of lack of subject matter jurisdiction is untimely. I cannot agree. Lack of subject matter jurisdiction cannot be waived and can be raised at anytime, even on appeal. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied, sub nom., Miller v. Morongo Band of Mission Indians*, 488 U.S. 1006 (1989). Moreover, defendants are in compliance with this court's Status (Pretrial Scheduling) Order of July 20, 1992, directing defendants to file any attack upon subject matter jurisdiction within 45 days.

[18] Specifically, plaintiffs seek a partial adjudication finding that Alberta Pork and Fletcher are not agents or instrumentalities within the meaning of the FSIA, that even if Alberta Pork and Fletcher are agents or instrumentalities within the meaning of the FSIA, this court nonetheless has subject matter jurisdiction with respect to claims arising out of Alberta Pork and Fletcher's commercial activities; that Alberta Pork and Fletcher have waived any immunity claim they may have; and that Alberta Pork and Fletcher have sufficient minimum contracts within this forum.

[19] The district courts have "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . with respect to which the foreign state

jurisdiction of United States' courts unless they fall into one of the exceptions provided for in the Act. 28 U.S.C. § 1330(a). For purposes of the FSIA, a foreign state includes political subdivisions, agencies or instrumentalities or organs of foreign states. 28 U.S.C. § 1603(a)&(b).

Determining whether Alberta Pork and Fletcher are agents or instrumentalities of the province of Alberta, Canada, under the FSIA is a subtle and difficult issue. Thankfully, I need not resolve it, because I determine below that even if these defendants are instrumentalities of a foreign state, the gravamen of the matters sued upon here are commercial in character for which defendants are not immune. *See* 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity.").

A. The Commercial Exception

Under the FSIA, there is a presumption that actions taken by foreign states or instrumentalities are sovereign acts, immune from consideration in an American court. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). Nonetheless, "[o]nce the plaintiff offers evidence that a FSIA exception to immunity applies, the party claiming

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is not entitled to immunity either under [28 U.S.C. §§ 1605-07] . . . or any other applicable international agreement." 28 U.S.C. § 1330(a).

immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Id.*

Here, plaintiffs assert that defendants' conduct falls within 28 U.S.C. § 1605(a)(2), the commercial activity exception to the FSIA.[20] Commercial activity is defined as either a regular course of commercial conduct or a particular commercial transaction or act. 28 U.S.C. § 1603(d).

A foreign sovereign may be liable under the commercial exception for activity either within or outside the United States. Applicability of the commercial exception for activity carried on in the United States depends on the foreign entity "carr[ying] on commercial activities in the United States." Plaintiff must also show that "[t]here [is] . . . a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance." *American West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989). Thus, in determining whether the commercial activity exception applies, I am directed to "focus only on those specific acts that form the basis of the suit." *Joseph*, 830 F.2d at 1023. That is, I must examine "whether the particular conduct giving rise

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[20] Courts in the United States may exercise jurisdiction over claims against a foreign state arising out of "commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character." *Id.* at 1023. As to activity that occurs outside the United States, I am directed to determine whether a foreign sovereign's foreign commercial activities "cause an effect in the United States that is substantial and foreseeable." *American West Airlines*, 877 F.2d at 799.[21]

Defendants argue that plaintiffs have failed to meet their burden in offering evidence that a commercial exception applies here, and further, that they cannot ascertain which exception plaintiffs' claim applies. While plaintiffs' position is less than pellucid, it appears that they make two claims, one relating to the defendants' employment of United States citizens, the other to the acquiring and shutting down of American competitors.[22]

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[21] The FSIA's legislative history explains that "commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States, and indebtedness incurred in the United States." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6615.

[22] Plaintiffs aruge [sic] that "FSIA does not protect foreign governmental entities from liability for violations of federal labor statutes in conjunction with employment of U.S. citizens in the United States," Plaintiffs' Mem. in Opp'n at 23, and further that their claims "arise directly from the APPDC/FFF commercial activity within the United States of establishing

The employment of United States residents constitutes commercial activity. *State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987). *See also* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6615 ("The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. . . . Activities such as a foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition."). [23] Because I have determined herein that Alberta Pork and Fletcher are employers for the purposes of COBRA, they are carrying on commercial activity within the United States. [24]

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export markets for Alberta Pork products through the acquisition and divestment of U.S. domestic pork processors." *Id.* at 5, 30.

[23] Defendants argue that because they are a market regulator, their actions with regard to imports and exports constitute a sovereign function. I cannot agree. While it is true that regulation of exports and imports, as for instance under a licensing scheme, is a sovereign function, from all that appears in the evidence, defendants' exporting and importing activity is of a garden variety commercial character. Even accepting their contention that Alberta Pork compels all of Alberta hog farmers to market their hogs through it, the defendants do not control the sovereign function of the right to export and import.

[24] For that reason, I need not consider whether plaintiffs' alternative theory, appearing to raise questions of anticompetitive conduct, constitutes commercial activity. For the same reason, I also need not determine whether defendants' borrowing activities constitute commercial activities or commercial activity

Defendants nonetheless contend that there is no nexus between the commercial activity and the claims in this case. *Mol, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984). Here, it is the employment of United States citizens which forms the basis of the suit.[25] Accordingly, actions based on breach of the conditions of employment have the requisite connection to the commercial activity to give this court jurisdiction.[26]

Defendants finally argue that because this court must first decide whether it has subject matter jurisdiction, the fact that ERISA, WARN, and COBRA may provide for

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outside the United States having a direct impact within the United States. *See* Eggleston Decl., Ex. 14 at 35 ("On November 19, 1991, the Company [Fletcher] discontinued financial support of its U.S. subsidiary Golden Gate Fresh Foods, Inc. All operations of Golden Gate were ceased on December 13, 1991 and a process of asset liquidation and debt extinguishment began . . . [Fletcher] has co-signed a bank operating line of credit for Golden Gate and expects this line of credit to be fully retired through the collection of remaining trade accounts receivable.").

[25] To the extent that defendants base this argument on the assumption that the commercial activity is the processing, marketing and sale of hog products, it must fail. As I have explained, the commercial activity asserted by plaintiffs is their employment of United States citizens in the United States.

[26] The determination that the defendants are engaged in commercial activity within the United States with respect to the COBRA claim ends my query for jurisdictional purposes. The FSIA provides this court with jurisdiction over the "commercial activity" and not over "the claim." Because plaintiffs' claims are all based on defendants' status as an employer, the court has jurisdiction over all the causes of action.

derivative liability on the merits is immaterial in determining this court's jurisdiction under the FSIA. They essentially argue that unless an agency or instrumentality is the direct employer of United States citizens, the FSIA provides no basis for subject matter jurisdiction. I disagree.

If Alberta Pork and Fletcher are considered employers, it is immaterial whether they are direct employers or employers based on an alter ego concept. *See* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6610 ("The [FSIA] is not intended to affect the substantive law of liability."). Alberta Pork and Fletcher are employers for the purposes of COBRA, and perhaps ERISA and WARN.[27] The FSIA provides this court with subject matter jurisdiction over the commercial activity of foreign sovereigns, including employment. Thus, subject matter jurisdiction is proper, and defendants' motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction on the grounds that they are entitled to immunity under the Foreign Sovereign Immunities Act is denied.[28]

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[27] Moreover, if the court were unable to resolve the issue of jurisdiction because it was inextricably intertwined with the merits, the court would be required to defer resolution of the issue. *See* Fed. R. Civ. P. 56(f).

[28] Given this disposition, I need not address plaintiff's motion for partial summary judgment that these defendants have minimum contracts within this forum. A finding of jurisdiction under the FSIA invests this court with personal jurisdiction. 28 U.S.C. § 1330(b). *See* 1976 U.S. Code Cong. & Ad. News 6612. "[28 U.S.C. § 1330(b)] provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned

B. Extraterritorial Application of United States' Laws

In connection with their challenge to this court's subject matter jurisdiction, defendants maintain that none of the statutes under which plaintiffs sue tolerate extraterritorial application. *See Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) (*"Aramco"*). Principles of extraterritorial application are applied when the acts giving rise to the suit occur entirely outside the United States. For example, in *Aramco*, the Court held that Title VII could not be applied extraterritorially to regulate the employment practices of a United States firm which employed an American citizen in Saudi Arabia.

In the case at bar, the lawsuit arises from employment practices entirely within the United States. *Aramco*, 111 S. Ct. 1227. *See also Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 504 (9th Cir. 1991) (in a suit under Lanham Act, court had jurisdiction without regard to exercise extraterritorial jurisdiction because the infringing goods passed through a United States foreign trade zone). Thus, this court has jurisdiction without reference to extraterritorial principles, and defendants' motion is denied as to this issue.[29]

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after the long-arm statute Congress enacted [for the District of Columbia]. The requirements of minimum jurisdiction contacts and adequate notice are embodied in the provision." I also need not and thus do not reach plaintiffs' argument that Alberta Pork or Fletcher have waived a claim of immunity.

[29] This would be the case even assuming the decision to close the plant were made in Canada, for the employment of

VI

PARENT COMPANY LIABILITY

Defendants Alberta Pork and Fletcher seek summary judgment on the WARN claim,[30] arguing that there are no "evidentiary facts . . . sufficient to raise genuine issues of fact . . . sufficient to require a trial on the issue of whether *alter ego* or other derivative liability should affirmatively be found."

While plaintiffs allege both Alberta Pork and Fletcher to be employers within the meaning of WARN, it is unclear whether they seek to hold Alberta Pork and Fletcher liable as direct employers, alter egos, or both.[31] I proceed on the assumption that plaintiffs seek to impose liability on Alberta Pork and Fletcher as both employers and as alter egos of either Golden Gate or Victor Foods with respect to the WARN claim. I turn to the question of whether Alberta Pork and Fletcher are employers, noting that the definition of employer under various federal statutes may differ, and may also differ from state definitions, and that "Congress often adopts an expansive definition of [the term employer]." *Holcomb v. Pilot Freight Carriers, Inc.*, 120 B.R. 35 (M.D.N.C. 1990).

United States citizens in the United States would still provide the contact necessary to invest the court with jurisdiction.

[30] Plaintiffs construe defendants' motion for summary judgment as applying only to the WARN claim. Defendants maintain it is directed toward all claims. It also appears to the court that defendants move for summary judgment only on the WARN claim.

[31] Likewise, it is unclear that plaintiffs seek to hold these defendants liable on the COBRA and ERISA claims as alter egos.

The plain language of the statute provides no guidance as to whether a parent corporation may be held as an employer under WARN.[32] Nor has the Ninth Circuit addressed the question.

The Secretary of Labor, however, is empowered to "prescribe such regulations as may be necessary to carry out [WARN]." 29 U.S.C. § 2108. The Secretary has adopted regulations which provide that under specified circumstances a parent company may be treated as an employer under the statute. They provide:

> Under existing legal rules, independent contractor and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common director and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operation.

20 C.F.R. § 639.3(a)(2).

In *Local 397 v. Midwest Fasteners, Inc.*, 779 F. Supp. 788 (D.N.J. 1992), Judge Fisher persuasively concluded that in determining whether to hold a parent corporation liable, the court should examine both state corporate law and

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[32] WARN defines an employer as: "any business enterprise that employs – (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a)(1).

federal common law as it relates to federal employment statutes and, in addition, evaluate the five factors enumerated in the regulation. *Id.* This analysis is consistent with the understanding of the Department of Labor. 54 Fed. Reg. 16,054 (April 20, 1989). *See also Cruz v. Robert Abbey, Inc.*, 778 F. Supp. 605 (E.D.N.Y. 1991).[33] In determining who is an employer for federal statutory purposes, less importance may be placed on the corporate form than when applying the common law's alter ego doctrine. *Holcomb*, 120 B.R. at 35.[34]

Following the *Midwest Fasteners* mode of analysis, I focus on Ninth Circuit "alter ego" and "piercing the corporate veil" doctrines (synthesizing the relevant state common law considerations), the federal common law relative to single employers, and the five factors enumerated in the Department of Labor regulations.

In this circuit, the determination that two corporations are single employers or alter egos is essentially a factual one, in which the same factors are considered.

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[33] Subsequent to the promulgation of the regulation cited in the text, the Department of Labor explained that "[t]he intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has developed under state corporations law and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA)."

[34] As Judge Fisher noted, "it is apparent that the D.O.L. did not envision a conflict between state corporation law 'alter ego' and 'piercing the corporate veil' doctrines and the federal common law 'single employer' doctrine." *Id.* at 791.

J.M. Tanaka Const., Inc. v. NLRB, 675 F.2d 1029, 1033 (9th Cir. 1982).[35] "In determining whether two businesses are alter egos, a court must consider the following factors: (1) centralized control of labor relations, (2) common management, (3) integration of operations, and (4) common ownership and financial control." *Id.*

The circuit has also developed " 'a sort of generalized federal substantive law on disregard of [the] corporate entity.' " *Ministry of Defense of Islamic Republic v. Gould, Inc.*, 969 F.2d 764, 769 (9th Cir. 1992). Three factors are examined in deciding whether to pierce the corporate veil, as contrasted with how to define an employer under a federal statute: "(1) the amount of respect given to the separate identity of the corporation by its shareholders, (2) the fraudulent intent of the incorporators, and (3) the degree of injustice visited on the litigants by recognition of the corporate entity." *Id.* at 769.[36]

Defendants, as moving parties, bear the burden of producing evidence demonstrating both the absence of a

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[35] Although the same factors are relevant in determining whether two companies are a single employer and whether they are alter egos, the doctrines function differently. Thus, in the context of a labor agreement, the single employer doctrine requires the employees of both companies be shown to constitute a single bargaining unit, while such showing is not required under the alter ego doctrine. *Carpenters' Local Union 1478 v. Stevens*, 743 F.2d 1271, 1276 (9th Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985).

[36] The court noted that it was not clear whether California law was to be incorporated or whether federal law was to be followed. *Gould*, 969 F.2d at 769 n.3. It determined, however, that California law on piercing the corporate veil was substantially similar to federal common law. *Id.*

genuine issue of material fact and their right to summary judgment. I turn to an examination of the various factors articulated in the cases in light of the evidence tendered by the parties. For the reasons explained below, the court concludes that there are genuine issues of fact which preclude pretrial resolution of the liability of the moving defendants as alter egos or employers.

A. Single Employer/Alter Ego

1. Centralized Control of Labor Management

The test as to whether the parent company controls labor management is not whether the parent exercise day-to-day control, but "whether the controlling company possesses the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries." *Midwest Fasteners*, 779 F. Supp. at 797. *See also National Labor Relations Board v. Carson Cable TV*, 795 F.2d 879, 883 (9th Cir. 1986) ("The fact that day-to-day control of labor relations at the 'worker level' is left in the hands of system manager is not dispositive. . . . Where the major labor policy decisions are made by a central authority, the Board may reasonably find that the criterion of central control of labor relations has been met.").

Defendants submit that Alberta Pork did not procure labor, services or merchandise for Fletcher or Golden Gate. Rennie Decl. ¶¶ 11-12; Duckenfield Decl. ¶¶ 20, 29-30. Plaintiffs counter by tendering evidence that Alberta Pork officers and delegates "participated in the decision by [Fletcher] to close Fletcher-owned and controlled operations and plant," Eggleston Decl. II, Ex. 13,

p.11, and that "Fletcher discontinued financial support for Golden Gate [causing] . . . operation of Golden Gate to cease[] on December 13, 1991." Eggleston Decl. II, Ex. H, p.35.

A parent corporation's formulation of the decision to close the plant may alone determine that there exists centralized control of labor relations. *Midwest Fasteners*, 779 F. Supp. at 797. Indeed, it seems uncontestable that a decision to terminate the work force is a major labor policy decision. *See NLRB v. Carson Cable*, 795 F.2d at 883. Thus, plaintiffs' evidence suggesting that Alberta Pork and Fletcher participated in that decision establishes the existence of a genuine issue of material fact as to this element.[37]

2. Common Management

Defendants maintain that with one exception, there has been no overlap of directors between Alberta Pork and Fletcher, or between Alberta Pork and Golden Gate, and after November of 1990, little overlap as between Golden Gate and Fletcher. Rennie Decl. ¶¶ 2-3; Duckenfield Decl. ¶¶ 4-9, 17-21. Plaintiffs, however, cite to evidence that "[d]uring 1991 the officers of [Golden Gate and Fletcher] included Fred W. Knoedler . . . William B. Duckenfield . . . and George Paleolgou."

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[37] This evidence also raises issues of fact concerning elements of the following factors listed in the following Department of Labor regulations: (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, (v) the dependency of operation.

Eggleston Decl. I, ¶¶ 30-31. Moreover, plaintiffs direct the court's attention to the overlap in directors as to some other connected corporations including Fletcher's Inc., Fletcher's Lodi and Financial Services. Eggleston Decl. I, ¶¶ 30-31. Thus, there appear to be disputes of material facts as to this issue which would preclude summary judgment.[38]

3. Integration of Operations

Defendants maintain that there was no integration of operators because Alberta Pork has dealt with Fletcher's competitors on an equal basis. Rennie Decl. ¶¶ 8-9, 11-12, 15-19; Duckenfield Decl. ¶¶ 21, 28, 32-33. Plaintiffs, however, point out that Fletcher was purchased to assist Alberta Pork in achieving the corporation's objectives of marketing and selling Alberta-produced hogs and to insure the establishment of export markets. Eggleston Decl. II, Ex. 14, p.24. Moreover, plaintiffs point to evidence that Fletcher made loans to Golden Gate and Fletcher, which Alberta Pork has guaranteed and which were not treated as liabilities of Golden Gate. Eggleston Decl. II, Ex. 15, p.10002-106. Plaintiffs also point to evidence that Golden Gate purchased raw product for its Lodi operation exclusively through Fletcher. Conrad Decl. ¶ 4. Plaintiffs have thus met their burden of establishing a dispute of material facts as to this issue.[39]

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[38] This evidence, of course, bears on factor (ii) of the Department of Labor regulations.

[39] This evidence bears on all of the Department of Labor's criteria.

4. Common Ownership and Financial Control

Defendants argue that while Alberta Pork owns 100% of Fletcher, Fletcher operates independently and there was no commingling of any funds as among Alberta Pork, Fletcher or Golden Gate. As noted above, it is undisputed that there is common ownership. In this circuit, a threshold question in determining whether there is a single employer is whether companies are substantially owned and controlled by identical parties. *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147, 1149 (9th Cir. 1989). This factor thus also weighs in favor of plaintiffs.[40]

Because there remains issues of material fact in dispute as to the parent company functioning as an employer or an alter ego, the motion for summary judgment on the WARN claim must be denied.

VII

ORDER

In summary, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' motion for partial summary judgment seeking a determination that employees terminated on or before November 20, 1991, and their dependents are qualified beneficiaries under 29 U.S.C. § 1167(3) is **GRANTED;**

2. Plaintiffs' motion for partial summary judgment seeking a determination that employees terminated after

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[40] It is also determinate of the Department of Labor's first factor.

November 20, 1991, and their dependents are qualified beneficiaries under 29 U.S.C. § 1167(3) is **GRANTED;**

3. Plaintiffs' motion for partial summary judgment seeking a determination that Alberta Pork and Fletcher are employers within the meaning of 29 U.S.C. § 1167(4) is **GRANTED;**

4. Plaintiffs' motion for partial summary judgment seeking a determination that Fletcher's Inc., Fletcher's Lodi and Financial Services are employers within the meaning of 29 U.S.C. § 1167(4) is **DENIED;**

5. Plaintiffs' motion for partial summary judgment seeking a determination that Alberta Pork continues to offer an employee benefits plan is **DENIED;**

6. Plaintiffs' motion for partial summary judgment seeking a determination that Fletcher continues to offer an employee benefits plan is **DENIED;**

7. Plaintiffs' Rule 56(f) motion for further discovery is **GRANTED;**

8. Defendants' motion for summary judgment on the COBRA claim is **DENIED;**

9. Knoedler's motion for judgment on the pleadings premised on his being an "employer" within the meaning of the WARN Act as to plaintiffs' first claim is **DEFERRED;**

10. Knoedler's motion for judgment on the pleadings premised on the failure to plead that he is an employer within the meaning of ERISA is **GRANTED** as to plaintiffs' second claim; **GRANTED** as to plaintiffs' fifth claim; and **DENIED** as to plaintiffs' third claim;

11. Knoedler's motion for judgment on the pleadings is **DENIED** as to plaintiffs' fourth claim;

12. Knoedler's motion to strike the jury demand is **GRANTED** as to the second, third, fourth, and fifth claim, but **DENIED** as to plaintiffs' first claim;

13. Knoedler's motion for partial summary judgment on plaintiffs' demand for extra-contractual damages on all claims is **GRANTED;**

14. Plaintiffs' motion for partial summary judgment seeking to establish that this court has jurisdiction over Alberta Pork and Fletcher's commercial activity is **GRANTED;**

15. The court declines to reach plaintiffs' motion for partial summary judgment seeking to establish that Alberta Pork and Fletcher have waived their immunity claims.

16. The court declines to reach plaintiffs' motion for partial summary judgment seeking to establish that Alberta Pork and Fletcher have minimum contracts within this forum;

17. Alberta Pork and Fletcher's motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction on the grounds that they are entitled to immunity under the Foreign Sovereign Immunities Act is **DENIED;**

18. Alberta Pork and Fletcher's motion for summary judgment seeking to establish that plaintiffs' WARN, COBRA and ERISA claims cannot be enforced extraterritorially is **DENIED** because extraterritorial principles are inapplicable in this suit;

20. Alberta Pork and Fletcher's motion for summary judgment on the WARN claim because there is no factual basis upon which to impose liability as an employer or to pierce the corporate veil is **DENIED.**

21. A further Status (Pretrial Scheduling) Conference is **SET** for July 6, 1993, at 3:00 p.m. The parties are directed to file and serve their Status Reports not later than seven (7) days prior to the date of the conference.

IT IS SO ORDERED.

DATED: May 20, 1993.

/s/ Lawrence K Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES
DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN GATES; ROBERT KINSER; CLIFFORD TRAVIS; DENNIS CONRAD; RICHARD DOBLE; EDMUND VINCELET; RICHARD WEYANT and JEROME BINDER; JEROME BINDER [sic], individually and on behalf of all other similarly situated,	No. 93-16141 D.C. No. CV-92-00095-LKK ORDER (Filed Jul. 10, 1995)
Plaintiffs-Appellees,	
v.	
VICTOR FINE FOODS, GOLDEN GATE FRESH FOODS, INC.,	
Defendant,	
and	
FLETCHER'S FINE FOODS; ALBERTA PORK PRODUCERS DEVELOPMENT CORPORATION,	
Defendants-Appellants.	

Before: TANG and O'SCANNLAIN, Circuit Judges; MERHIGE,* District Judge.

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Appellants' motion for order staying issuance of mandate for thirty days pending application for writ of certiorari is GRANTED.

APPENDIX E

EGGLESTON & SIEGEL
JAMES E. EGGLESTON No. 98772
1330 Broadway, Suite 1700
Oakland, California 94612
(415) 451-9500

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN GATES, ROBERT KINSER, CLIFFORD TRAVIS, DENNIS CONRAD, RICHARD DOBLE, EDMUND VINCELET, RICHARD WEYANT, and JEROME BINDER, Individually and on behalf of all others similarly situated, Plaintiffs, vs. VICTOR FINE FOODS, GOLDEN GATE FRESH FOODS, INC., FLETCHER FINE FOODS, ALBERTA PORK PRODUCERS DEVELOPMENT CORP., FRED KNOEDLER, BILL DUCKENFIELD, GEORGE PALEOLOGOU, VICTOR FINE FOODS GROUP BENEFITS PLAN, ASSURED INVESTORS LIFE COMPANY, and ANTHEM LIFE INSURANCE COMPANY, Defendants.	NO: CIV-S-92 095 LKK PAN CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE WARN ACT, ERISA, AND BREACH OF FIDUCIARY DUTY JURY TRIAL REQUESTED (Filed Jan. 21, 1992)

I. PRELIMINARY STATEMENT

1. This is a Class Action for Declaratory and Injunctive Relief, and Ancillary Damages brought by Plaintiffs on behalf of more than 300 former employees of the Victor Fine Foods plant in Lodi, California who lost their jobs in November, 1991 as a result of the closing of the plant. This action arises under the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 USC § 2101 et. seq. for Defendants' refusal to provide Plaintiffs with 60 days' advance notice of the Lodi plant closing; and under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 USC § 1001 et. seq. for Defendants' refusal to afford Plaintiffs' notice of and rights to elect continuation coverage under group health plans ("COBRA Rights"), for Defendants' refusal to pay health care benefits and claims incurred prior to the plant closing, and for Defendants' deliberate refusal to give advance notice of the plant closing, or notice of COBRA Rights for the purpose of interfering with the rights and benefits of Plaintiffs under the Victor Fine Foods Group Benefit Plan. Plaintiffs seek temporary, preliminary and permanent Injunctive Relief enjoining Defendants' violations of the WARN Act and ERISA, and recovery of wages, benefits, ancillary damages, penalties and attorneys fees as provided in the WARN Act and ERISA.

II. JURISDICTION AND VENUE

2. This is an action brought pursuant to §§ 3 and 5 of the WARN Act, 29 USC §§ 2102 and 2104, and pursuant to §§ 502(a) and (c) of ERISA, 29 USC §§ 1132(a) and (c). The Court has subject matter jurisdiction pursuant to

29 USC § 2104(a)(5), 29 USC §§ 1132(e) and (f), and 28 USC § 1331.

3. Venue is proper in this District and in this Court pursuant to 29 USC § 2104(a)(5) and 29 USC § 1132(a)(2) in that the violations of law occurred in, and Defendants transact business in this District.

III. PARTIES

4. Plaintiff JOHN GATES is an individual residing in San Joaquin County, California. Plaintiff GATES was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California. Plaintiff GATES was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

5. Plaintiff ROBERT KINSER is an individual residing in San Joaquin County, California. Plaintiff KINSER was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California. Plaintiff KINSER was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

6. Plaintiff CLIFFORD TRAVIS is an individual residing in San Joaquin County, California. Plaintiff TRAVIS was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California.

Plaintiff TRAVIS was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

7. Plaintiff DENNIS CONRAD is an individual residing in San Joaquin County, California. Plaintiff CONRAD was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California. Plaintiff CONRAD was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

8. Plaintiff RICHARD DOBLE is an individual residing in San Joaquin County, California. Plaintiff DOBLE was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods Plant in Lodi, California. Plaintiff DOBLE was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

9. Plaintiff EDMUND VINCELET is an individual residing in San Joaquin County, California. Plaintiff VINCELET was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California. Plaintiff VINCELET was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

10. Plaintiff RICHARD WEYANT is an individual residing in San Joaquin County, California. Plaintiff WEYANT was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine

Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California. Plaintiff WEYANT was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

11. Plaintiff JEROME BINDER is an individual residing in San Joaquin County, California. Plaintiff BINDER was an employee of Defendants Victor Fine Foods, Golden Gate Fresh Foods, Inc., and Fletcher Fine Foods until his layoff in November, 1991 as a result of the closing of the Victor Fine Foods plant in Lodi, California. Plaintiff BINDER was, and is a participant and qualified beneficiary of the Victor Fine Foods Group Benefits Plan.

12. Defendant VICTOR FINE FOODS ("VICTOR") is a business entity of unknown form which operated a meat processing plant in Lodi, California at which members of the Plaintiff class were employed until their layoff in November, 1991 due to the closing of the plant. VICTOR is an "Employer" of members of the Plaintiff class within the meaning of 29 USC §§ 1002(5), 1167(4), and 2101(a)(1). VICTOR is a "Plan Sponsor" within the meaning of 29 USC § 1002(16)(B) and a "Fiduciary" within the meaning of 29 USC § 1002(21)(A) with respect to the establishment and administration of the Victor Fine Foods Group Benefits Plan. Plaintiffs are informed and believe and allege thereon that VICTOR is wholly owned and controlled by Defendant Golden Gate Fresh Foods, Inc.

13. Defendant GOLDEN GATE FRESH FOODS, INC. ("GOLDEN GATE") is a corporation organized pursuant to the laws of the State of California and doing business in Lodi, California. Plaintiffs are informed and

believe and allege thereon that GOLDEN GATE wholly owns, controls and does business in the name of Defendant VICTOR FINE FOODS. Defendant GOLDEN GATE is an "Employer" of members of the Plaintiff class within the meaning of 29 USC §§ 1002(5), 1167(4), and 2101(a)(1). Defendant GOLDEN GATE is a "Plan Sponsor" within the meaning of 29 USC § 1002(16)(B) and a "Fiduciary" within the meaning of 29 USC § 1002(21)(A) with respect to the establishment and administration of the Victor Fine Foods Group Benefits Plan. Plaintiffs are informed and believe and allege thereon that Defendant GOLDEN GATE is wholly owned and controlled by Defendant Fletcher Fine Foods.

14. Defendant FLETCHER FINE FOODS ("FLETCHER") is a business entity of unknown form organized under the laws of British Columbia, Canada and doing business in, inter alia, Lodi, California under the name of and as GOLDEN GATE FRESH FOODS, INC. and VICTOR FINE FOODS. Defendant FLETCHER is an "Employer" of members of the Plaintiff class within the meaning of 29 USC §§ 1002(5), 1167(4) and 2101(a)(1). Defendant FLETCHER is a "Plan Sponsor" within the meaning of 29 USC § 1002(16)(B) and a "Fiduciary" within the meaning of 29 USC § 1002(21)(A) with respect to the establishment and administration of the Victor Fine Foods Group Benefits Plan. Plaintiffs are informed and believe and allege thereon that Defendant FLETCHER is wholly or substantially owned and controlled by Defendant Alberta Pork Producers Development Corp.

15. Defendant ALBERTA PORK PRODUCERS DEVELOPMENT CORP. ("ALBERTA") is a business of

unknown form organized under the laws of Alberta, Canada and doing business in, inter alia, Lodi, California in the name of and as FLETCHER FINE FOODS, GOLDEN GATE FRESH FOODS, INC., AND VICTOR FINE FOODS. Defendant ALBERTA is an "Employer" of members of the Plaintiff class within the meaning of 29 USC §§ 1002(5), 1167(4), and 2101(a)(1). Defendant ALBERTA is a "Plan Sponsor" within the meaning of 29 USC § 1002(16)(B) and a "Fiduciary" within the meaning of 29 USC § 1002(21)(A). Plaintiffs are informed and believe and allege thereon that Defendant ALBERTA wholly or substantially owns and controls Defendants FLETCHER, GOLDEN GATE AND VICTOR.

16. Defendant FRED KNOEDLER ("KNOEDLER") is an individual who resides in British Columbia, Canada and who is an officer of Defendants VICTOR, GOLDEN GATE, AND FLETCHER. Defendant KNOEDLER is a "Fiduciary" within the meaning of 29 USC § 1002(21)(A) with respect to the administration of the Victor Fine Foods Group Benefits Plan.

17. Defendant BILL DUCKENFIELD ("DUCKENFIELD") is an individual who resides in Lodi, California and is an officer of Defendants VICTOR, GOLDEN GATE, AND FLETCHER. Defendant DUCKENFIELD is a "Fiduciary" within the meaning of 29 USC § 1002(21)(A) with respect to the administration of the Victor Fine Foods Group Benefits Plan.

18. Defendant GEORGE PALEOLOGOU ("PALEOLOGOU") is an individual who is a resident of British Columbia, Canada and a [sic] officer of Defendants VICTOR, GOLDEN GATE, and FLETCHER. Defendant

PALEOLOGOU is a "Fiduciary" within the meaning of 29 USC § 1002(21)(A).

19. Defendant VICTOR FINE FOODS GROUP BENEFITS PLAN ("GROUP BENEFITS PLAN") is an "Employee Welfare Benefit Plan" within the meaning of 29 USC § 1002(1), an "Employee Benefit Plan" within the meaning of 29 USC § 1002(3), and a "Group Health Plan" within the meaning of 29 USC § 1167(1). Defendant VICTOR FINE FOODS GROUP BENEFITS PLAN is identified by the United States Treasury and the United States Department of Labor by Employer Identification Number 68-0168433 and Plan Identification Number 501.

20. Defendant ASSURED INVESTORS LIFE COMPANY ("ASSURED INVESTORS") is a business entity of unknown form doing business in the County of San Joaquin, California. Defendant ASSURED INVESTORS is the "Administrator" of the Defendant VICTOR FINE FOODS GROUP BENEFITS PLAN within the meaning of 29 USC § 1002(16)(A). Defendant ASSURED INVESTORS is a "Fiduciary" of the VICTOR FINE FOODS GROUP BENEFITS PLAN within the meaning of 29 USC § 1002(21)(A).

21. Defendant ANTHEM LIFE INSURANCE COMPANY ("ANTHEM") is an insurance company of unknown form organized under the laws of the State of Texas and doing business in the State of California. Defendant ANTHEM pays benefits to qualified beneficiaries of the VICTOR FINE FOODS GROUP BENEFITS PLAN and is a "Fiduciary" within the meaning of 29 USC § 1002(21)(A) with respect to the administration of the VICTOR FINE FOODS GROUP BENEFITS PLAN.

22. Plaintiffs are informed and believe and allege thereon that all Defendants were agents and employees of each other and were at all times acting within the purpose and scope of such agency and employment with respect to the violations of law, repudiation of Group Benefits Plan obligations and breaches of fiduciary duty described herein.

IV. CLASS ACTION ALLEGATIONS

23. Plaintiffs named in paragraphs 1-22 above, bring this action on their own behalf, and, pursuant to Rule 23(a) and (b)(1) and (2) of the Federal Rules of Civil Procedures on behalf of all others similarly situated, as follows:

(a) Individuals formerly employed at of [sic] the VICTOR FINE FOODS meat processing plant in Lodi, California who suffered loss of employment in or about November, 1991 as a consequence of the closing of the plant, and who were not afforded advance notice of the plant closing as required by law. There are more than 300 persons within this Class.

(b) Participants and qualified beneficiaries of the VICTOR FINE FOODS GROUP BENEFITS PLAN who have been denied the right to elect continuing health care benefits under the GROUP BENEFITS PLAN and who have been denied entitlement to benefits and payment of claims covered by and payable under the PLAN. There are more than 300 persons within this class.

24. The requirements of Rule 23(a) and (b)(1) and (2) are met in that the members of each subclass

described in Paragraph 23 above are so numerous as to make joinder of all members before this Court impossible and impracticable; there are common questions of law and fact involving Defendants' acts and omissions in violation of the WARN Act and ERISA; the claims of the representative parties are typical of the Plaintiff classes; the representative parties, seeking to vindicate federal statutory rights and rights under an employee benefit plan, will fairly and adequately represent the interests of the Plaintiff classes; the Plaintiff classes are represented by counsel possessing the requisite expertise to maintain this action; the prosecution of separate actions by individual members of the Plaintiff classes would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for parties opposing the claims of the class; and, the Defendants have acted or failed or refused to act on grounds generally applicable to the Plaintiff classes, thereby making final declaratory and injunctive relief with respect to the classes appropriate.

V. FIRST CLAIM FOR RELIEF (Violation of WARN Act)

25. Plaintiffs reallege and incorporate by reference Paragraph 1 through 24 of the Complaint as if fully set forth herein.

26. Within a 30-day period in or about November, 1991, more than 300 persons who are all members of the Plaintiff class defined in Paragraph 23(a) above were terminated from their employment with Defendants VICTOR, GOLDEN GATE AND FLETCHER as a result of the

permanent closing of the VICTOR FINE FOODS plant, located at Highway 99 North Frontage Road in Lodi, California.

27. Defendants failed and refused to provide any advance notice of the closing of the Lodi plant to members of the Plaintiff class described in Paragraph 23(a) above, or to the State Dislocated Workers Unit, or Chief Elected Official of the City of Lodi or San Joaquin County as required by the WARN Act, 29 USC § 2102.

28. As a direct and proximate result of Defendants' unjustified and deliberate refusal to afford Plaintiffs advance notice of the Lodi plant closing as required by the WARN Act, Plaintiffs have suffered serious harm from the surprise closure due to the sudden and unexpected loss of permanent and stable employment, severe income loss, sudden deprivation of health care benefits, and consequent emotional distress, humiliation, embarrassment and family disruption.

29. As a result of Defendants' calculated and unjustified refusal to afford advance notice as required by the WARN Act, each member of the Plaintiff Class described in Paragraph 23(a) is entitled to the full and complete penalties, restitution and compensation provided by 29 USC § 2104(a)(1) without mitigation or reduction.

30. The individual Plaintiffs and Class members have and will continue to suffer irreparable harm if restitution and restoration of critically needed health benefits is not ordered pursuant to 29 USC § 2104(a)(1).

VI. SECOND CLAIM FOR RELIEF
(Breach of Duty to Provide Notice and Right to Elect Continuation Coverage)

31. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 30 of the Complaint as if fully set forth herein.

32. On or about November 20, 1991, Defendants terminated all benefits and coverage under the VICTOR FINE FOODS GROUP BENEFITS PLAN without warning or advance notice of any kind for members of the Plaintiff class described in Paragraph 23(b) above because of Plaintiffs' termination from employment.

33. Since November 20, 1991 and continuing, Defendants have refused to afford members of the Plaintiff class described in Paragraph 23(b) above continuation coverage for health benefits as required by 29 USC § 1162.

34. Since on or about November 20, 1991 and continuing, Defendants have refused to afford notice to members of the Plaintiff Class described in Paragraph 23(b) above of Plaintiffs' rights to elect continuation coverage for health benefits as required by 29 USC § 1166.

35. Each member of the Plaintiff Class is entitled to continuing coverage and health benefits as provided in the VICTOR FINE FOODS GROUP BENEFITS PLAN until such time as Defendants afford Plaintiffs the notice and election of rights required by 29 USC § 1165 and is further entitled to the penalties provided in 29 USC § 1132(c)(1).

36. The individual Plaintiffs and class members have and will continue to suffer irreparable harm if restoration of their health benefits is not ordered pursuant to 29 USC § 1132.

VII. THIRD CLAIM FOR RELIEF
(Claim for Benefits Under the Plan)

37. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 36 from the Complaint as if fully set forth herein.

38. The VICTOR FINE FOODS GROUP BENEFITS PLAN provides that "[t]ermination of coverage of this Group Policy by the Policyholder or by us will be without prejudice to any claim originating prior to the date of termination."

39. On or about November 20, 1991 when Defendants announced termination of all benefits and coverage for participants and qualified beneficiaries under the Group Benefits Plan, members of the Plaintiff class described in Paragraph 23(b) above had incurred medical expenses and submitted claims covered and payable by the GROUP BENEFITS PLAN which had not been paid by the PLAN. Since on or about November 20, 1991, and continuing, Defendant PLAN has repudiated and breached its obligation to Plaintiffs for payment of these claims and has refused and continues to refuse to pay pending claims and reimburse covered medical expenses as required by the terms of the PLAN. Plaintiffs have made demands for payment of pending claims and provision of PLAN benefits which have been refused. Further

demands for payment of claims and benefits would be futile and useless.

40. The individual Plaintiffs and class members have and will continue to be irreparably harmed as a consequence of Defendants' repudiation and breach of the obligations to provide medical benefits under the GROUP BENEFITS PLAN unless enjoined by this court in that the failure and refusal to provide required PLAN benefits and pay covered claims has jeopardized and interfered with Plaintiffs' ability to obtain continuing and necessary medical care.

VIII. FOURTH CLAIM FOR RELIEF
(Breach of Fiduciary Duties)

41. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 40 of the Complaint as if fully set forth herein.

42. Defendants KNOEDLER, DUCKENFIELD, PALEOLOGOU, ASSURED INVESTORS and ANTHEM, as Fiduciaries of the GROUP BENEFITS PLAN, have breached their fiduciary duties to PLAN participants and beneficiaries by causing the Plan to repudiate and breach its obligations to provide a right of election to continuation of coverage, by refusing to afford Plaintiffs notice of this right of election, and by refusing to pay claims and satisfy PLAN benefit obligations which arose prior to the November 20, 1991 Lodi plant closing and announcement of termination of PLAN coverage.

43. Defendants VICTOR, GOLDEN GATE and FLETCHER, as the GROUP BENEFITS PLAN sponsors

and fiduciaries who appointed Defendants KNOEDLER, DUCKENFIELD, PALEOLOGOU, ASSURED INVESTORS and ANTHEM to their fiduciary positions, have failed to monitor the performance of the fiduciaries of the PLAN, have failed to assure that such fiduciaries perform their duties in accordance with the requirements of ERISA, and have participated in a knowing and willful breach of their fiduciary duties by aiding and abetting these breaches. Accordingly, Defendants VICTOR, GOLDEN GATE and FLETCHER are jointly and severally liable for the correction of the breaches of fiduciary duties specified herein.

44. Defendants have showed themselves, by the conduct described herein, to be unwilling or unable, and incompetent, to perform the fiduciary duties required of fiduciaries and of a plan administrator under ERISA. Unless enjoined by this Court, Defendants will continue in their breach of fiduciary duties and Plaintiffs will continue to suffer irreparable harm by the denial of medical benefits required to be provided under the GROUP BENEFITS PLAN.

IX. FIFTH CLAIM FOR RELIEF (Discrimination and Interference with Plan Benefits)

45. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 44 of the Complaint as if fully set forth herein.

46. Defendant Plan Fiduciaries are prohibited under ERISA, 29 USC § 1140 from discharging or discriminating against PLAN participants or beneficiaries for the purpose of interfering with the attainment of any rights to

benefits which a participant or beneficiary may become entitled to under the GROUP BENEFITS PLAN.

47. Defendants' repudiation of benefit obligations under the PLAN and the timing and implementation of Defendants' decision to terminate PLAN coverage and benefits for members of the Plaintiff Class described in Paragraph 23(b) were intended to, and did interfere with and deny Plaintiffs the attainment of irrevocable rights and benefit entitlements under the PLAN in violation of ERISA, 29 USC § 1140.

48. As a direct and proximate result of Defendants' discriminatory scheme and interference with Plaintiffs' GROUP BENEFITS PLAN rights, Plaintiffs have suffered and continue to suffer irreparable harm and ancillary damages including loss of health care and health care benefits.

WHEREFORE, Plaintiffs respectfully pray that the court:

1. Enter an order declaring that Defendants VICTOR FINE FOODS, GOLDEN GATE FRESH FOODS, INC., and FLETCHER FINE FOODS are and were obligated to afford Plaintiffs 60-days advance notice of the closing of the Victor Fine Foods Lodi, California plant and award Plaintiffs the penalties and restitution provided for in 29 USC § 2104(a)(1) with interest and without mitigation or reduction;

2. Enter an order declaring that Defendants KNOEDLER, DUCKENFIELD, PALEOLOGOU, ASSURED INVESTORS and ANTHEM are required to afford Plaintiffs a right to elect continuation coverage and

provide notice of the right of election at the time of Plaintiffs' layoffs resulting from closure of the VICTOR Lodi plant.

3. Enter an order for temporary, preliminary and permanent injunctive relief enjoining Defendants and each of them from denying or interfering with provision of continuation health plan coverage for Plaintiffs, and notice to Plaintiffs of the right to elect continuation coverage, and prohibiting Defendants from denying Plaintiffs full and ongoing coverage under the GROUP BENEFITS PLAN until such time as Plaintiffs are purported proper notice of the right to elect continuation coverage and have exhausted the proper time period within which to make such election.

4. Enter an order that Defendants pay to each of the Plaintiffs described in Paragraph 23(b) above the sum of $100 each day from the date of Defendants' failure and refusal to provide Plaintiffs with notice of the right of election of continuation benefit plan coverage.

5. Award Plaintiffs ancillary damages incidental to the injunctive relief sought herein;

6. Award Plaintiffs the cost of this action and reasonable attorneys' fees in accordance with 29 USC § 1132(g) and 2104(a)(6); and

7. Award such further relief as may be just and proper.

DATED: January 21, 1992

EGGLESTON & SIEGEL
JAMES E. EGGLESTON

/s/ James E. Eggleston
Attorneys for Plaintiffs

Supreme Court, U.S.
FILED
AUG 30 1995
CLERK

No. 95-175

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FLETCHER'S FINE FOOD, LTD.,
Petitioner,
v.
JOHN GATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. EGGLESTON *
PAMELA ALLEN
EGGLESTON, SIEGEL & LEWITTER
1330 Broadway, Suite 1700
Oakland, California 94612
(510) 451-9500

DAVID ROSENFELD
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

* Counsel of Record
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a corporation which is wholly owned by an agency or instrumentality of a foreign state, rather than by a political subdivision of a foreign state, and is not an "organ of a foreign state or political subdivision thereof" is subject to the jurisdiction of the United States Courts under the Foreign Sovereign Immunities Act?

LIST OF PARTIES

Plaintiffs and respondents John Gates, Robert Kinser, Clifford Travis, Dennis Conrad, Richard Doble, Edmund Vincelet, Richard Weyant and Jerome Binder (collectively "plaintiffs") are the certified class representatives of the approximately 300 persons who were formerly employed at the meat packing plant of defendant Victor Fine Foods ("Victor") in Lodi, California. In connection with their employment, plaintiffs were participants in defendant Victor Fine Foods Group Benefits Plan ("Plan"), an employee welfare benefit plan for the Victor employees, and are the certified class representatives of all participants existing at the time the Plan was terminated, as well as the dependent beneficiaries of those participants.

Victor was a trade name of defendant Golden Gate Fresh Foods, Inc., a California corporation ("Golden Gate"), which was the owner of the plant and was plaintiffs' employer. Victor itself (but not Golden Gate) has been dismissed from this case as a party defendant. Defendant Fletcher's Fine Foods, Ltd., a Canadian corporation ("Fletcher's"), the petitioner herein, was the corporate grandparent (now greatgrandparent) holder of a majority interest in Golden Gate. In turn, Fletcher's was wholly owned by defendant Alberta Pork Producers Development Corporation ("Alberta Pork"), a corporation established pursuant to the Alberta Marketing of Agricultural Products Act.

Defendant Fred Knoedler was the president and chief executive officer of Golden Gate, and at different times was and now is president and chief executive officer of Fletcher's. He was also a director of both entities, during times which overlapped. Defendant Bill Duckenfield was the executive vice president, chief operating officer and a director of Golden Gate. He is the market development manager of Fletcher's and served as its vice president in 1988.[1] Defendant George Paleopogou was the chief fi-

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[1] The "List of Parties" set forth in the Petition misrepresents that Bill Duckenfield has never been an officer of Fletcher's.

nancial officer and a director of Golden Gate, and at different times was chief financial officer and a director of Fletcher's. He has been dismissed from this case as a party defendant.

Defendants Assured Investors Life Company and Anthem Life Insurance Company are insurance companies which issued various insurance policies to Golden Gate. Anthem Life Insurance Company has been dismissed from this case as a party defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-175

FLETCHER'S FINE FOOD, LTD.,
Petitioner,

v.

JOHN GATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John Gates, *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's Opinion below. That Opinion is reported at 54 F.3d 1457 (9th Cir. 1995) and is reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

In January 1992, plaintiffs filed a class action Complaint against their direct employer Golden Gate Fresh Foods ("Golden Gate") which owned and operated a pork processing plant in Lodi, California under the trade name Victor Fine Foods. Plaintiffs also named as de-

fendants: the Alberta Pork Producers Development Corporation ("Alberta Pork"), a Canadian corporation authorized by a regulation of the Province of Alberta to be established and operate as a marketing agent for Alberta Hog Producers [1]; petitioner Fletcher's Fine Foods, Ltd. ("Fletcher's"), a Canadian corporation which, through various corporate subsidiaries, owned a majority of the shares of Golden Gate and which, in turn, was wholly owned by Alberta Pork; Fred Knoedler, president and chief executive officer of both Golden Gate and Fletcher's; Bill Duckenfield, executive vice president, chief operating officer and a director of Golden Gate and the market development manager and former vice president of Fletcher's; the Victor Fine Foods Group Benefits Plan ("Plan"), the group health insurance plan covering employees of Golden Gate; and Assured Investors Life Company, the administrator of the Plan.

Plaintiffs asserted the following five claims for relief arising out of closure of the Lodi plant and termination of the Plan: (1) violation of the Worker Adjustment Retraining and Notification Act (WARN Act), 29 U.S.C. § 2101, *et seq.*, for failure to give sixty (60) days' notice of intent to close the Lodi plant; (2) violation of the health care continuation coverage provisions of the Employee Retirement Income Security Act of 1974, as amended, (ERISA), 29 U.S.C. §§ 1161-1168, for failure

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[1] Although Alberta Pork is subject to the general regulatory authority of the Alberta Agricultural Marketing Council, it is an independent corporation controlled and operated by a board and delegates comprised solely of private, commercial hog producers from Alberta. The exclusive purpose of Alberta Pork is to promote the profitable marketing and sale of hogs produced in Alberta for the private, commercial benefit of participating hog producers. Alberta Regulation 195/68. Alberta Pork's sole source of income is derived from a commission on the sale of hogs for member producers. Thus, Alberta Pork serves as the agent for Alberta hog producers in a private, commercial enterprise of marketing and selling Alberta produced hogs. It acts for, and on behalf of the hog producers and is subject to their control.

to give Plan participants and beneficiaries notice of entitlement to, and the right to convert to, continuation health care coverage upon termination of employment; (3) breach of Plan obligations for failure to pay benefits for covered health care services rendered prior to the termination of the Plan; (4) breach of fiduciary duty for failure to cause the Plan to pay covered pre-termination benefits and to offer continuation coverage; and (5) violation of § 510 of ERISA, 29 U.S.C. § 1140, for interfering with the plaintiffs' rights to elect continuation coverage by terminating the Plan in anticipation of the plant closure. (A copy of plaintiffs' Complaint is reprinted in the Petition at Appendix E.)

Defendants Alberta Pork and Fletcher's filed a motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, *et seq.*, claiming that they are "agencies or instrumentalities" of the Province of Alberta, Canada. In an Order dated May 24, 1993, the District Court declined to resolve the question of whether the Canadian defendants are "agents or instrumentalities" of Alberta, concluding that even if they did enjoy such status "the gravamen of the matters sued upon here are commercial in character for which defendants are not immune." *See*, Petition at A-54.

The District Court identified the basis of plaintiffs' claims to be their employment, then, by reference to the definition of "employer" under ERISA § 607(4), 29 U.S.C. § 1167(4), determined that both Alberta Pork and Fletcher's were the plaintiffs' employers and, therefore, that they were not entitled to immunity. The District Court observed that if foreign defendants are "considered employers, it is immaterial whether they are direct employers or employers based on an alter ego concept" for purposes of determining jurisdiction. *See* Petition at A-59. The District Court concluded that:

> Determination that the defendants are engaged in commercial activity within the United States with respect to the COBRA claim ends my query for ju-

> risdictional purposes. The FSIA provides this Court with jurisdiction over the "commercial activity" and not over "the claim." Because plaintiffs' claims are all based on defendants' status as an employer, the Court has jurisdiction over all the causes of action.

See, Petition at A-58, fn. 26.

Defendants Alberta Pork and Fletcher's filed an interlocutory appeal in the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the District Court's decision as to Alberta Pork and affirmed as to Fletcher's. The Court of Appeals held that Alberta Pork was an "agency or instrumentality of the Province of Alberta." *See,* Petition at A-13. The Ninth Circuit further concluded that the allegations against Alberta Pork were not based on commercial activities and that Alberta Pork had not waived its right to claim immunity. Accordingly, the Court of Appeals held that, under the FSIA, Alberta Pork was entitled to immunity with regard to plaintiffs' allegations.

The Ninth Circuit concluded that Fletcher's, however, is not entitled to immunity under the FSIA because it was wholly owned by Alberta Pork, an "agency or instrumentality" of the Province of Alberta, rather than by the Province itself, or some other political subdivision of a foreign state. After reviewing the regulation adopted by the Province of Alberta which allowed private hog producers to form a marketing corporation[2] (Alberta Pork) and the 1981 amendment thereto which allows Alberta Pork to purchase businesses with the capacity to "process and sell pork and pork related products[3] (e.g., Fletcher's), the Court of Appeals observed that Fletcher's is "an ordinary pork processing plant." The Court then carefully considered the statutory distinctions between foreign states, political subdivisions, and agencies or in-

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[2] Alberta Regulation 195/68.

[3] Alberta Regulation 99/81.

strumentalities of foreign states and their political subdivisions, set forth in 28 U.S.C. § 1603, concluding that as a wholly owned subsidiary corporation of an "agency or instrumentality" of a political subdivision of a foreign state, Fletcher's is not entitled to immunity under the FSIA.

Based on that conclusion, the Court declined to discuss plaintiffs' arguments that Fletcher's is subject to jurisdiction in the United States courts pursuant to 28 U.S.C. § 1605(a)(2) by virtue of its commercial activity in the United States and/or waiver of its claim of immunity pursuant to 28 U.S.C. § 1605(a)(1).

The Ninth Circuit denied Fletcher's petition for rehearing and rejected its request for rehearing en banc by order dated June 22, 1995 and Fletcher's petitioned this Court for Writ of Certiorari on July 31, 1995. Respondents oppose the Petition for the reasons set forth below.

REASONS TO DENY THE WRIT

I. THE NINTH CIRCUIT OPINION DOES NOT CREATE A CONFLICT WITH OTHER CIRCUIT COURTS. RATHER, THE NINTH CIRCUIT APPLIED THE FACTS OF THIS CASE AND CONCLUDED THAT UNDER THE STATUTORY STRUCTURE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT, PETITIONER IS NOT ENTITLED TO IMMUNITY

In an effort to invoke this Court's jurisdiction, the petitioner attempts to create a conflict where there is none. The petitioner has attempted to establish a "tiering" doctrine of derivative immunity based on a small number of cases which are factually and/or procedurally distinguishable. Since there is no real or intolerable conflict among Circuits on the issue presented, there is no basis for review.

A. Decisions In Which Jurisdiction Was Not Denied On The Basis Of Foreign Sovereign Status Do Not Conflict With The Ninth Circuit's Decision In This Case

Petitioner cites seven decisions from six other Circuit Courts of Appeals which it claims are in conflict with the Ninth Circuit's opinion in this case.[4] In four of those cases, the issue of foreign state status was either not presented to the Court or the case was decided on alternative grounds. Only one of the seven decisions on which petitioner relies contains any analysis of the statutory interpretation issues on which petitioner seeks review, and that analysis appears in dicta. Moreover, the discussion of the issue in that case precisely mirrors the Ninth Circuit's analysis in this case, directly contradicting petitioner's representation of conflicting holdings.

In *Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3d Cir. 1993), *cert. denied sub nom., Ejay Travel, Inc. v. Algemeen Burgerlijk Pensionenfonds*, —— U.S. ——, 114 S.Ct. 2101, 128 L.Ed.2d 663 (1994), the Third Circuit was asked to review a district court holding that two Dutch parent corporations were subject to jurisdiction in a U.S. court under the FSIA's commercial activity exception to immunity, 28 U.S.C. § 1605(a)(2). The defendants in question were the top two links in a chain of five corporations which owned an office building in Philadelphia, Pennsylvania. The case involved various tort claims arising out of a fire in that building. The district court had ruled that the Dutch corporations were "foreign states" for purposes of the FSIA. While the Third Circuit specifically acknowl-

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[4] Petitioner also cites five decisions from the Ninth Circuit and six decisions from various district courts which it claims are in conflict with the decision herein. While allegedly conflicting decisions within the same circuit and from district courts are not identified as reasons for granting review in Sup.Ct.R. 10, for the sake of completeness, those cases, none of which presents an actual conflict, are discussed briefly, as well.

edged that it was not asked to review that aspect of the district court's decision, it nonetheless expressed doubt about the correctness of that holding, stating:

> As noted previously, none of the various parties dispute this determination on appeal. Judge Greenberg points out that while none of the parties contended in the district court and none have contended on this appeal that USA Holding is not a foreign state this assumption might not be correct. If USA Holding is a foreign state it can only be by reason of its ownership by APB which is an agency or instrumentality of the Dutch government. Judge Greenberg believes that a reasonable inference might be drawn that the term "foreign state" in 28 U.S.C. § 1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state. He reasons that if "foreign state" in § 1603(b)(2) includes an "agency or instrumentality" of a foreign state then it must also include a "political subdivision" of a foreign state yet § 1603(b)(2) expressly provides that an "agency or instrumentality" may be an "organ of" or be owned by a "political subdivision" of a foreign state. In this regard he points out that § 1603(a) expressly provides that "foreign state" includes both political subdivisions and agencies or instrumenalities. Thus, a reasonble inference can be drawn that the term "political subdivision" must have been used in § 1603 (b)(2) because "foreign state" in that section did not include a "political subdivision thereof." Otherwise the term "political subdivision" in § 1603(b)(2) is superfluous. Furthermore, it can be argued reasonably that Congress by the inclusion of "political subdivision" and the omission of "agency or instrumentality" in § 1603(b)(2) intended to distinguish between these types of entities, the inference being that the former but not the latter could own an entity which could be regarded as an agency or instrumentality of a foreign state.

Federal Insurance Co., supra, 12 F.3d at 1285, fn. 12.

Not only does the Third Circuit's reading of 28 U.S.C. § 1603(b)(2) fail to create a conflict, it presents precisely the same logical analysis of the clear statutory language articulated by the Ninth Circuit in this case.

None of the other cases cited by the petitioner scrutinize the structure of 28 U.S.C. § 1603(b). They are distinguishable for that reason alone, as well as for other reasons. *O'Connell Machinery Co. v. M. V. Americana*, 734 F.2d 115 (2d Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984), involved the issue of whether a plaintiff could attach a foreign vessel for purposes of securing prejudgment interest. The defendants were an Italian shipping line owned by administrative agencies of the Italian government and a vessel owned by that shipping line. There was no ruling that the district court lacked jurisdiction over those defendants. To the contrary, the Second Circuit noted the express exception to immunity in 28 U.S.C. § 1605(b) for liens in admiralty cases involving commercial activity, and relied on legislative history indicating that Congress expressly intended the FSIA to provide a procedure for serving and obtaining in personam jurisdiction over foreign states so as to render unnecessary the practice of seizing and attaching the property of foreign states in order to obtain jurisdiction. *Id.* at 117, citing H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604.[5]

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[5] This same issue was presented in *Outbound Maritime Corp. v. P.T. Indonesian Consortium*, 582 F.Supp. 1136 (D. Ma. 1984), one of the district court decisions cited by petitioner. In that case, the court quashed a writ of attachment on cargo owned by two defendants which were corporations wholly owned by the Republic of Indonesia on the ground that maritime jurisdiction did not apply. In the alternative, the court determined, on the basis of an affidavit submitted by the Consul of the Consulate General of the Republic of Indonesia, that the defendant corporations were "agencies or instrumentalities" of Indonesia and were, therefore, entitled to the protection against prejudgment attachment provided by the FSIA. In reaching that alternative holding, however, the court

Linton v. Airbus Industrie, 30 F.3d 592 (5th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 639, —— L.Ed. 2d —— (1995), presented the issue of whether the removal, statute, specifically 28 U.S.C. § 1441(d), bars appellate review of an order of remand based on lack of jurisdiction where the defendant failed to demonstrate its right to removal under the FSIA. While the Fifth Circuit did briefly discuss the issue of whether the defendant could be entitled to immunity as a foreign sovereign, that discussion was in dicta. *Id.* 30 F.3d at 598, fn. 29. The Court of Appeals expressly declined to decide the issue of immunity on the ground that it lacked jurisdiction to do so by virtue of a District Court decision holding that the defendants were not "instrumentalities" of foreign states, and were not, therefore, entitled to immunity. The Court dismissed the appeal, allowing the remand order to stand.[6]

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stated that, "this is a preliminary issue which does not interfere in any manner with the considered determination of the merits of this matter under the applicable law." *Id.* at 1145.

[6] Three of the district court cases which petitioner claims conflict with the holding in this case also involved issues of removal jurisdiction. In each of those cases, a foreign defendant who was sued in a state court removed the action pursuant to 28 U.S.C. § 1441(d) which permits removal by defendants who qualify as "foreign states" pursuant to 28 U.S.C. § 1603. While the defendants' right to removal was sustained in each of those cases, none of the bases hold that the defendants were immune from jurisdiction in the U.S. courts. In *Lopez del Valle v. Gobierno de la Capital*, 855 F.Supp. 34 (D. P.R. 1994), an asphalt company which was wholly owned by the nationalized Venzuelan Oil Industry was deemed to be a "foreign state" for purposes of removal jurisdiction, but was still subject to suit in the United States under the FSIA. Similarly, in *Balentine v. Union Mortgage Co.*, 795 F.Supp. 266 (N.D. Ill. 1992), a bank which was wholly owned and controlled by the Bank of Finland, a political subdivision of the Republic of Finland, was deemed to have properly removed an action to federal court on the basis of its "foreign state" status but was not entitled to immunity from suit. Finally, in *Talbot v. Saipem A.G.*, 835 F.Supp. 352 (S.D. Tex. 1993), a shipping line, the majority of shares of which were indirectly owned by the Ministry

The fourth decision cited by petitioner which was not resolved on the basis of foreign sovereign status is *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 10 F.3d 425 (7th Cir. 1993). While the Seventh Circuit observed in dicta that the defendant in question (Zenith Data Systems) was "practically an arm of the French state," it offered no analysis of whether the ownership structure of the various defendants defeated immunity because the conduct at issue was deemed to fall within the commercial activities exception to the immunity provided by the FSIA. *Id.*, 10 F.3d at 428.[7]

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of Treasury of the Republic of Italy, was deemed to have properly removed the action to federal court, but was forced to defend on the grounds that it waived any claim of immunity it might have by virtue of its conduct.

A fourth district court case cited by petitioner, *Ocasek v. Flintkote Co.*, 796 F.Supp. 362 (N.D. Ill. 1992), involved a plaintiff's attempt to establish diversity jurisdiction in an action brought against a Canadian corporation allegedly owned by the Province of Quebec through a series of subsidiary corporations which were determined in an earlier case to be "foreign states" by virtue of Quebec's ownership and control. The *Ocasek* court dismissed the complaint on the ground that the plaintiff failed to demonstrate diversity because there was no evidence of current ownership by the Province. Notably, the same defendant was subject to jurisdiction in the earlier case because it involved a claim for which foreign states are not immune. *Id.*, 796 F.Supp. at 365.

[7] Two of the Ninth Circuit decisions which petitioner claims conflict with the decision in this case, were also decided on the basis of the commercial activities exception. In *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444 (9th Cir. 1991), *cert. denied sub nom., China Everbright Trading Co. v. Timber Falling Consultants, Inc.*, —— U.S. ——, 113 S.Ct. 295, 121 L.Ed.2d 219 (1992), a defendant corporation organized under the laws of China was deemed to be an "instrumentality" of China, but was not entitled to immunity from suit in the United States because the conduct giving rise to the suit was deemed to be commercial activity. In *Straub v. A P Green, Inc.*, 38 F.3d 448 (9th Cir. 1994), a defendant wholly owned by a Crown Corporation of the Province of Quebec, Canada was deemed to be an "instrumentality" of a foreign state. However, the Court of Appeals offered no

B. Decisions Involving Direct Ownership Of Corporate Defendants By Foreign States Have No Application To The Analysis Of This Case

The remaining decisions of other Circuits cited by petitioner for the proposition that ownership by an agency or instrumentality of a foreign state automatically confers immunity on a corporation are easily distinguished based on the character of the owners involved in those cases. In *Trump Taj Mahal v. Costruzioni Aeronautiche Giovanni*, 761 F.Supp. 1143 (D. N.J. 1991), *aff'd mem.*, 958 F.2d 365 (3d Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992), the Court ruled that an entity owned and controlled by the Italian government engaged in aviation operations, which included military aircraft activities, could claim immunity under the FSIA even though its ownership by the government was through three tiers of administrative agencies. Unlike Alberta Pork, the evidence in *Trump Taj Mahal* indicated that the agencies in question were actually controlled by the Italian government which was actively involved in the operation of each successive entity.

In *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), the Court of Appeals remanded to the district court the issue of whether it had subject matter jurisdiction under the FSIA over two French corporations on the basis of the commercial acivities exception. The first corporation was wholly owned directly by the Republic of France. Though it is somewhat unclear in the decision, it appears that a majority of the shares of the second corporation were, in turn, owned by the first corporation.

Finally, in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), the Court concluded that defendants, which included the Republic of Ireland, two ad-

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analysis for that conclusion and jurisdiction was asserted over the defendant pursuant to the FSIA by virtue of the commercial activities exception to sovereign immunity.

ministrative agencies owned by Ireland, and a corporation wholly owned by one of those agencies were "foreign states" within the meaning of the FSIA. Notably, the plaintiff in that case specifically alleged in his complaint that the Irish agencies and the corporation owned by one of them were "agents of the defendant Republic [of Ireland]" and the District Court observed that, "[i]t is undisputed between the parties that all defendants are foreign states within the meaning of section 1603." *Id.* at 1024; 1026, fn. 19.

Similarly, in two of the Ninth Circuit decisions which petitioner claims conflict with this case, the parties did not dispute the defendants' status as foreign sovereigns. In *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466 (9th Cir. 1995), the plaintiff conceded in the district court that the Mexican Coffee Institute ("INMACAFE") was established under Mexican law and had met its burden if demonstrating sovereign status. *Id.* at 1470-71. In *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989), the defendant in question, Airmotive, was wholly owned by one of two entities which comprised the national airline of Ireland and which were directly owned by the Republic of Ireland. The court expressly noted that it was undisputed that those two entities were "foreign states," and, though not clearly articulated in the decision, Airmotive, by virtue of its owner's foreign state status, fell within the definition of "agency or instrumentality of a foreign state."

The one remaining decision on which petitioner relies in an effort to invoke this Court's jurisdiction by asserting a conflict in *Keller v. Transportes Aereos Militares Ecuadorianos*, 601 F. Supp. 787 (D.D.C. 1985). The two defendants seeking immunity in that case were Transportes Aereos Militares Ecuadorianos ("TAME"), which was created as a department of the Ecuadorian Airforce by the Government of Ecuador's Military Council, and the Transportes Aereos Nacionales Ecuadorianos ("TAME C.A."), an entity which was 99.97% owned by

TAME. The court concluded that TAME, as a department of the Ecuadorian military, was a "foreign state" and TAME C.A., by virtue of its owner's foreign state status, was an "agency or instrumentality" of a foreign state.

Unlike the defendants seeking immunity in the above cases, petitioner herein is not owned either directly or indirectly by the federal government of Canada, the provincial government of Alberta, or by any political subdivision of either of those governments. Rather, it is owned by Alberta Pork, an independent corporation controlled and operated by private hog producers subject only to the general regulatory authority of the Alberta Agricultural Marketing Council. At best, Alberta Pork is an "agency or instrumentality" of a political subdivision of a foreign state. Thus, petitioner, an "ordinary pork procesing plant" owned by Alberta Pork, cannot claim sovereign immunity based on its relationship to Alberta Pork because a majority of its shares are not owned by a "foreign state or political subdivision thereof," as required to meet the definition of "foreign state" set forth in 28 U.S.C. § 1603(b).

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE STATUTORY STRUCTURE OF THE FSIA AND CONGRESS' OVERRIDING CONCERN FOR THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY

Petitioner concedes that the Ninth Circuit's analysis in this case is consistent with a "literal reading of the interrelationship between Sections 1603(a) and 1603(b)" of the FSIA. Indeed, the Ninth Circuit carefully observed the rule that it must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 105 S. Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), quoting, *Park'n Fly, Inc. v. Dollar Park and*

Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 661, 83 L.Ed.2d 582 (1985).

Nonetheless, petitioner argues that this Court should review the Ninth Circuit's analysis on the ground that other Circuits, in the decisions cited above, have applied a broader and equally "tenable" reading of the governing statutory provisions. As discussed above, each of those cases is readily distinguishable from the facts and procedural posture of this case. The decisions relied upon by petitioner did not require the careful analysis of statutory structure employed by the Ninth Circuit in this case, either because the issue was not before the court, or the defendants in those cases were able to demonstrate majority ownership by a "foreign state," or that one of the statutory exceptions to immunity applied.

Moreover, the Ninth Circuit's analysis in this case is consistent with Congress' concerns that the "restrictive" principle of sovereign immunity apply and that American citizens should have "access to the courts in order to resolve ordinary legal disputes" with entities owned by foreign states. H.R. Rep. No. 94-1487, 94 Cong., Second Sess. 15, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6605. The broad reading of the statutory provisions defining "foreign state" advocated by the petitioner is not supported either by the plain language of the statute or the legislative history.

III. THE NINTH CIRCUIT CORRECTLY FOUND THAT PETITIONER IS NOT AN "ORGAN" OF A FOREIGN STATE OR POLITICAL SUBDIVISION THEREOF

In addition to its argument that as a "lower-tier" corporation it is entitled to derivative immunity, petitioner asserts that it is an "organ" of Alberta Pork and is entitled to immunity on that basis. Petitioner correctly notes that Congress did not expressly define "organ" and proposes that the term be construed to encompass any "subordinate entity that either is controlled by another

entity or that acts for the benefit of that other entity." Petitioner then asserts that it benefits Alberta Pork because, in accordance with Alberta Regulation 99/81, Fletcher's was purchased "[i]n order to enable the Board [of Alberta Pork] to effectively promote and sell hogs and processed pork."

The plea for a grant of certiorari on this ground should be denied for two reasons. First, it is obvious from a reading of 28 U.S.C. § 1603(b)(2) that a defendant seeking immunity cannot be both an "organ of a foreign state or political subdivision thereof" and an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . ." The fact that Congress differentiated between the term "organ" and entities connected by ownership interest indicates that it did not intend the definition of "organ" to include corporate entities.

Second, the definition of "organ" proposed by petitioner has no basis in the law and is so vague and overbroad it would encourage claims of immunity by defendants Congress never intended be covered by the FSIA. The proposed definition was simply invented for purposes of Fletcher's petition. Moreover, petitioner's claim that its activities are at least in part for the benefit of Alberta Pork is unfounded. The regulation permitting Alberta Pork to purchase private pork processing concerns (Alberta Regulation 99/81) amends the Alberta Pork Producers' Marketing Plan which was approved by the Alberta Agricultural Products Marketing Council and codified in an earlier regulation (Alberta Regulation 195/68). The Marketing Plan was designed to promote hog sales for the benefit of private hog producers. Alberta Pork, which is controlled and operated by those producers, is merely a means to that end.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

JAMES E. EGGLESTON *
PAMELA ALLEN
EGGLESTON, SIEGEL & LEWITTER
1330 Broadway, Suite 1700
Oakland, California 94612
(510) 451-9500

DAVID ROSENFELD
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

* Counsel of Record

Counsel for Respondents